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Supreme Court of the United States

OCTOBER TERM, 1992

HELEN B. BARNES, M.D.; JOSEPH MITCHELL, M.D.; JOSEPH BOOKER, M.D., on behalf of themselves, their patients, and all others similarly situated; NEW WOMAN MEDICAL CENTER, INC.; and MISSISSIPPI WOMEN'S MEDICAL CENTER,

Petitioners,

—v.—

MIKE MOORE, as Attorney General of the State of Mississippi, and his employees, agents and successors,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Under the "undue burden" standard of review established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), are litigants in facial challenges to restrictive abortion laws entitled to an evidentiary hearing in order to demonstrate that the statute imposes an undue and thus unconstitutional burden on a woman's right to choose abortion?

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this petition.

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No. 92-____

HELEN B. BARNES, M.D.; JOSEPH MITCHELL, M.D.; JOSEPH BOOKER, M.D., on behalf of themselves, their patients, and all others similarly situated; NEW WOMAN MEDICAL CENTER, INC.; and MISSISSIPPI WOMEN'S MEDICAL CENTER,

Petitioners,

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MIKE MOORE, as Attorney General of the State of Mississippi, and his employees, agents and successors,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit entered on August 17, 1992.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi was filed on August 30, 1991. 9a-14a. A panel of the United States Court of Appeals for the Fifth Circuit issued an order on August 5, 1992, 8a, and an opinion on August 17, 1992. 1a-7a.[1] The district court opinion is not reported. The court of appeals opinion is reported at 970 F.2d 12 (5th Cir. 1992).

JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1) (1988), which provides for review by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4) (1988), for petitioners[2] stated a claim for violation of their constitutional rights under 42 U.S.C. § 1983 (1988).

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[1] The opinions and statutory provisions involved are reprinted in the Appendix to this Petition for a Writ of Certiorari. Citations to this Appendix are made to the page number therein as "___a." Citations to the affidavits submitted in support of the motion for a preliminary injunction are cited as "Last Name Dec. ¶ ___." Citations to the affidavits submitted in support of the motion for stay of the mandate and for injunction pending review by this Court are cited as ___a (Last Name Dec. ¶ ___). The transcript to the preliminary injunction hearing are cited as "Tr. at ___ (Last Name).

[2] This petition will refer to plaintiffs-appellees as "petitioners" and to defendant-appellant as "respondent" or as "the Attorney General."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I, which provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

U.S. Const. amend. IX, which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U.S. Const. amend. XIV, which provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Miss. Code Ann. §§ 41-41-31 to -39 (Supp. 1991). 15a-19a.

STATEMENT OF THE CASE

Miss. Code Ann. §§ 41-41-31 to -39 (Supp. 1991) [hereinafter "the Act"] was enacted over the Governor's veto on March 28, 1991.[3] The statute requires physicians to provide all women seeking abortions with a prescribed litany of misleading

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[3] In vetoing the bill, the Governor stated:

> This bill is not about information or consent. This bill is about who makes a most personal, intimate decision: politicians or a woman with her family, her doctor, and her God. . . .
>
> I fully support the position of the Mississippi Medical Association, which strongly urged me to veto this bill. The Association says this bill would do irreparable harm to the doctor-patient relationship.

and inaccurate information discouraging abortion and to delay the procedure at least twenty-four hours after the information is provided. These requirements apply even where, in the physician's best professional judgment, they impose a substantial obstacle on a woman's ability to obtain an abortion or where provision of the information will mislead the woman.[4]

On May 21, 1991, petitioners, three physicians and two Jackson clinics, which together provide the vast majority of abortions in the State of Mississippi,[5] filed suit in the United States District Court for the Southern District of Mississippi, challenging the Act's constitutionality under the First, Ninth and Fourteenth Amendments. On June 7, 1991, several weeks before the Act's July 1, 1991, effective date, petitioners moved for a temporary restraining order and preliminary injunction. On June 14, 1991, the Attorney General agreed to stay enforcement of the Act until September 1, 1991, because the state had not yet prepared the printed materials required under the Act. *See* Miss. Code Ann. §§ 41-41-33(b)(iv), 41-41-35; 17a-18a. The Attorney General responded to petitioners' preliminary injunction motion on August 12, 1991, and provided petitioners with a draft of the required materials less than ten days before the scheduled hearing.

The hearing on petitioners' preliminary injunction motion

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[4] The only exception to the requirement of the 24-hour delay is the case of a "medical emergency," narrowly defined by Miss. Code Ann. § 41-41-31(b) as "that condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate an immediate abortion to avert the death of the mother or for which a 24-hour delay will create grave peril of immediate and irreversible loss of major bodily function." 15a.

[5] A Southaven clinic, the only other provider in the state, is not a plaintiff. However, the physician who provides abortions in Southaven also provides services at one of the two Jackson clinics. *See* 29a (Tucker Dec. ¶ 1).

was held on August 28 and 29, 1991.[6] Due to insufficient time, only two witnesses, Dr. Helen B. Barnes and Dr. John C. Morrison, testified on behalf of petitioners as to the Act's detrimental impact on Mississippi women. *See* Tr. at 176-77 (Jones). Three additional witnesses, Dr. Freda M. Bush, Dr. Beverly A. McMillan and Angela Ford, testified on behalf of respondent.[7]

On August 30, 1991, the last business day before the Act was to go into effect, the district court granted a preliminary injunction. In a seven-page memorandum opinion relying exclusively on *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) ("*Akron I*"), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), the trial court found a likelihood of success on petitioners' claim that the Act violated the strict scrutiny standard then governing abortion restrictions. 11a-13a.[8] Specifically noting the "truncated" nature of the preliminary injunction

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[6] Although initially allotting only one day for the hearing, the district court continued it to the early morning of August 29, 1991, to hear one additional defense witness. Tr. at 249-51 (Cole).

[7] Cross examination revealed substantial bias on the part of the purportedly independent medical experts called by respondent. For example, Dr. McMillan had been arrested "four to five" times for illegal protests against abortion outside the plaintiff clinics. Tr. at 279 (McMillan). Dr. Bush admitted to being professionally as well as personally opposed to abortion, even in cases of rape or incest. Tr. at 212-13, 218 (Bush).

[8] That the district court applied *only* the strict scrutiny standard of *Akron I* and *Thornburgh* has been repeatedly confirmed by the respondent, who, prior to this Court's decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), rested his entire appeal in the court of appeals on the ground that the district court had erred in *not* applying the "undue burden" standard. Appellant's Brief at 21-35, *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992) (No. 91-1953) ("A.G. Br at ___").

hearing, the district court made *no* findings regarding the facts,[9] expert opinions related to petitioners' claims, or the credibility of witnesses. 14a.[10]

Four days later, on September 3, 1991, the Attorney General appealed, contending that the preliminary injunction should be vacated and the case dismissed. In initial briefs and in supplemental briefs filed after this Court decided *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), the Attorney General sought dismissal even though petitioners had never been afforded a full evidentiary hearing and the district court had neither made findings of fact nor applied the Supreme Court's "undue burden" test to the minimal record in the case. Taking the position that in a facial challenge the court need not consider the purpose or effect of the restrictions on women's reproductive choice, respondent stated:

> the "facts" were necessarily speculative and irrelevant and . . . the question of facial constitutionality of the statute was essentially a question of law. The court's review of the merits is basically confined to a legal analysis of the four corners of the statute to determine whether some conceivable set of facts exists in which the statute could be validly applied.

A.G. Br. at 8. In response, petitioners argued that, in light of *Casey*, the case should be remanded for further proceedings to determine whether the statute would pose an "undue burden" on a significant proportion of Mississippi women.

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[9] The trial court also failed to address petitioners' First Amendment claims or petitioners' claim that the Act's medical emergency exception both is void for vagueness and endangers women's health, in violation of due process and privacy rights.

[10] *See also* Tr. at 340, 343 (noting necessity of ruling on preliminary injunction motion prior to the Act's effective date, and suggesting that findings of fact would follow).

The court of appeals heard oral argument on August 5, 1992. Within hours of argument, the court issued an order immediately vacating the preliminary injunction. 8a. On August 17, 1992, in an eight-page per curiam opinion, relying on *Casey* and *United States v. Salerno*, 481 U.S. 739, 745 (1987), the appeals court held that the Mississippi statute was facially constitutional as a matter of law and that "[f]urther evidentiary proceedings would not affect that conclusion." 7a. Declining to remand for an assessment of the statute's constitutionality under the "undue burden" standard,[11] the court of appeals instead "remand[ed] th[e] case to the district court for entry of an order of dismissal." 7a.[12]

Because the rationale and consequence of the court's opinion so misunderstand and narrow the relief available to plaintiffs challenging restrictive abortion laws on their face, the opinion deprives *Casey* of meaning, and thus petitioners seek a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DECIDED AN ISSUE OF GRAVE PUBLIC IMPORTANCE IN CONFLICT WITH THE PRECEDENTS OF THIS COURT

A. The Court of Appeals Decided An Issue Of Grave Public Importance.

The decision of the court of appeals presents a question of fundamental importance that will have far-reaching implications for the women of this nation: Under the "undue burden"

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[11] Like the district court, the court of appeals failed to address petitioners' First Amendment and vagueness claims.

[12] Petitioners filed a motion for a stay of the mandate and for an injunction pending review by this Court on certiorari, but this motion was denied on September 21, 1992.

standard established by this Court in *Casey*, are litigants who facially challenge abortion laws similar to those at issue in *Casey* entitled to an evidentiary hearing in order to prove the existence of an "undue burden"? Or, as the court of appeals found, does the *Casey* holding, which was based on a limited factual record developed under the strict scrutiny standard of review, preclude all litigants from ever proving that these laws impose an "undue burden" on women's rights to choose abortion?

Fundamental fairness demands that the presence or absence of an "undue burden" be determined in each case on a record that specifically focuses on the burdens on women affected by the challenged law, not on a record developed in another case, under a different standard of review. Any other result will prevent women throughout the nation from having their "day in court" and will force them to suffer grievous harm before vindication of their constitutional rights. The evidence petitioners are prepared to present at trial graphically illustrates the "undue burdens" created by the Mississippi law and the dangers presented when constitutional conclusions about the effect of a law are reached without reference to record evidence.

In the several weeks since the court of appeals vacated the district court's injunction, Mississippi's twenty-four hour mandatory delay and biased counseling provisions have imposed substantial obstacles on many women seeking abortions in the state. Mississippi abortion providers have seen the number of women obtaining abortions plummet by more than fifty percent. 30a, 34a (Tucker at ¶ 10, Rogers Dec. ¶ 8).[13] Indeed, the physician who provides abortions at two of the state's three clinics stated that "[i]n all my years of clinical practice I have

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[13] Three declarations, attached in support of petitioners' motion for a stay of the mandate and for an injunction pending review by this Court, are reprinted in the appendix as a partial offer of the factual evidence that petitioners would introduce at trial. Evidence related to petitioners' vagueness and First Amendment claims, the illegitimate purpose of the law and the misleading nature of the information that the statute requires physicians to provide would also be presented at trial.

never seen such a sudden and dramatic drop in the number of patients seeking abortions all at once and in every location in the state." 30a (Tucker at ¶ 9). The effect of this harsh law is compounded by the lack of abortion services in most of Mississippi,[14] the long distances that more than half of Mississippi women must travel to obtain abortions,[15] and the extraordinary poverty of Mississippi women.[16] These burdens are further exacerbated by the intimidation and harassment directed at women seeking abortions by abortion opponents.[17]

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[14] There are no known abortion providers in 80 of Mississippi's 82 counties. 23a (Forrest Dec ¶7). By contrast, 17% of counties nationwide have at least one provider. 23a (Forrest at ¶ 7). This shortage, combined with the very limited schedules of the few existing providers, 29a (Tucker at ¶ 4), means that the 24-hour waiting period actually results in much longer delays.

[15] Nearly half of all women seeking abortions in Mississippi travel more than 100 miles to reach a clinic, compared to nine percent of women nationally. 24a (Forrest at ¶ 9). Fifty-five percent of Mississippi women live more than 50 miles from a provider. 24a (Forrest at ¶ 7). Long travel distance can not only delay abortion care, but also deny it outright. 24a-25a, 26a (Forrest at ¶¶ 10, 16).

[16] Mississippi has the lowest median household income in the nation and the highest percentage of children under 18 living in poverty. 25a-26a (Forrest at ¶¶ 12-13). Although many women managed to obtain abortions despite their indigence before the Act went into effect -- some paid for their abortions in rolls of nickels and dimes, Brown Dec. ¶ 6 -- additional state-imposed costs and travel away from home can readily make the difference between having choices and having none at all.

[17] Solely as a result of the mandatory delays, women recently obtaining abortions in Mississippi have been subjected to increased surveillance and harassment by abortion opponents. For example, abortion opponents have begun recording patients' license plate numbers to obtain their names and addresses from sympathetic law enforcement officials and using the time afforded by the mandatory delay to wage a harassment campaign against these women, their families and friends. 33a-34a (Rogers at ¶¶ 6-8); 36a-40a.

By rejecting their facial challenge and ordering dismissal of the case in its entirety, the court of appeals has left petitioners and the women they serve with little recourse: they may challenge the law when defending against a criminal prosecution[18] or otherwise seek declaratory or injunctive relief after the unduly burdensome law has been implemented. Either alternative will deprive women of their right to terminate an unwanted pregnancy free of unlawful governmental interference, thereby causing them to suffer unnecessary and irreparable harm.[19]

Indeed, forcing women to delay vindication of their constitutional rights until after implementation of this statute presents them with an unacceptable Hobson's choice. They can either delay their abortions for the mandated twenty-four hours and accept the biased counseling, or challenge the state restriction as applied to them, thereby necessarily suffering the inevitable

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[18] The Attorney General has argued that the dismissal of this action does not prevent "an 'as applied' challenge as a defense to an alleged misapplication of the statute in an actual concrete criminal proceeding, where there is a specific factual situation in which the court may assess the specific misapplication." Appellants' Supplemental Brief at 3 n.2, *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992) (No. 91-1953) ("A.G. Supp. Br. at ___"). But the Attorney General's proposed alternative to facial challenges is no remedy for those women or physicians who, under coercion, choose to comply with the Act's requirement, or for those women or physicians whose rights are violated by the Act, but who, for a variety of reasons, are not prosecuted under it. Such a restricted notion of constitutional adjudication is also inconsistent with this Court's own view that "as applied" challenges are not limited to individual misapplications of the law. *See Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring); *id.* at 652-53 (Blackmun, J., dissenting).

[19] *See Casey*, 112 S. Ct. at 2807; *Roe v. Wade*, 410 U.S. 113, 153 (1973).

delay caused by litigation.[20] Whether it results from the statutory provisions themselves, or from the time-consuming effort necessary to bring an "as applied" challenge to the law, the required delay will, in violation of this Court's holding in *Casey*, impose substantial obstacles on some women seeking to obtain abortions.[21] Thus, this case raises an issue of grave public importance that must be reviewed by this Court.

Ironically, by forcing Mississippi women to choose among these equally objectionable alternatives, the court of appeals provides them with fewer rights than even the litigants in *Casey*. Because of this Court's order,[22] the plaintiffs in *Casey* will have an opportunity on remand to present the district court with detailed evidence of the "undue burdens" created by the Pennsylvania statute before it is enforced against them. Surely the petitioners in this case are entitled to the same.

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[20] A woman may also find a physician who will risk criminal prosecution and license suspension by performing the abortion. However, because few physicians if any will violate the law and risk prosecution, this is, at best, a theoretical option.

[21] This Court has refused to put women in a "Catch-22" situation in which all their "choices" end with the same result. For example, in *Bellotti v. Baird*, 443 U.S. 622 (1979), the Court invalidated a parental consent statute because its judicial bypass procedure -- the only option available to a young woman who did not want to involve her parents in her abortion decision -- required that the court notify a parent whose daughter sought a judicial bypass. *Id.* at 647-48; *see also Hodgson v. Minnesota*, 110 S. Ct. 2926, 2950 (1990) (O'Connor, J., concurring).

[22] This Court remanded for "proceedings consistent with this opinion, including consideration of the question of severability." 112 S. Ct. at 2833.

B. By Denying Petitioners An Opportunity To Present Factual Evidence, The Decision Of The Court Of Appeals Contravenes *Casey* And Other Precedents Of This Court.

Dismissal of this case by the court of appeals contravenes one of the central components of *Casey*. *Casey* not only reaffirmed the essential holding of *Roe v. Wade*, 410 U.S. 113 (1973),[23] it also established the "undue burden" standard to measure the constitutionality of abortion laws. This standard requires courts to examine closely how a challenged law harms those affected by its mandates.

Specifically, the Court stated:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.

Id. at 2820 (joint opinion) (emphasis added).[24] The Court

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[23] In *Casey*, this Court reaffirmed that statutory bans on abortion prior to viability are unconstitutional, stating that "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." 112 S. Ct. at 2821 (opinion of O'Connor, Kennedy, and Souter, JJ.); *see also id.* at 2817 (joint opinion). Although subsequent to viability a state may regulate or even proscribe abortion, as long as adequate exceptions are made to protect the woman's life and health, *id.* at 2804, 2822, "before viability, the State's interests are not strong enough to support a prohibition of abortion *or* the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.* at 2804.

[24] By mandating judicial inquiry into the purpose of abortion laws, this Court in *Casey* clearly envisioned that litigants could challenge these laws on their face, and that, upon a proper showing, courts could grant facial relief.

elsewhere explained that if "in a large fraction of the cases in which [the statute] is relevant, it *will operate* as a substantial obstacle to a woman's choice . . . [i]t is an undue burden, and therefore invalid." *Id.* at 2830 (emphasis added).

When applying this standard in *Casey*, this Court closely scrutinized the district court's numerous findings of fact to determine whether the statute created an "undue burden" on women's liberty. For example, in finding Pennsylvania's husband notification requirement facially invalid, this Court reviewed the substantial burdens *before* women were subjected to its constraints. The Court recounted at length "the testimony of numerous expert witnesses" and the district court's "detailed findings of fact regarding the effect of this statute." *Id.* at 2826; *see also id.* at 2826-28. It then concluded that some women affected by the husband notification requirement "are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." *Id.* at 2829.[25]

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[25] While admitting that *Casey* "made repeated references to the evidence in the record and the other findings of fact by the district court," the court of appeals believed these factual findings were irrelevant in part because *Casey* "'set forth a standard of general application.'" 7a (quoting *Casey*, 112 S. Ct. at 2820 (joint opinion)).

In calling the "undue burden" standard one of "general application," the joint opinion merely sought to articulate the new standard and to reconcile past statements about the undue burden test "that could be considered inconsistent." 112 S. Ct. at 2820 (joint opinion). The statement in no way foreclosed examination of the relevant facts on a different record when applying the test in future cases. As this Court itself remarked, "*Roe* has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and . . . the need for such review will remain as a consequence of today's decision . . . ." *Id.* at 2809; *see also id.* at 2856 (Rehnquist, C.J., concurring in part and dissenting in part) (*Casey* "leaves the Court in a position to closely scrutinize all types of abortion regulations").

Similarly, in addressing Pennsylvania's twenty-four-hour waiting period, this Court carefully examined the record developed in the district court to evaluate whether the provision, on its face, imposed an undue burden on the right to choose abortion.[26] *Id.* at 2825-26 (joint opinion). Though ultimately upholding this provision, the joint opinion stated that it was a "close[] question" and noted that "troubling" findings of fact tended to show that "the twenty-four hour waiting period will be 'particularly burdensome'" for certain classes of women. *Id.* at 2825 (joint opinion). The waiting period, therefore, was upheld only "*on the record before [the Court].*" *Id.* at 2826 (joint opinion) (emphasis added).[27]

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[26] In upholding the 24-hour delay, this Court recognized that the district court had no occasion to reach the question of whether the requirement would impose an undue burden because it had applied "the trimester framework's strict prohibition of all regulation designed to promote the State's interest in potential life before viability," *id.* at 2825 (joint opinion), and that, under that standard, nearly identical Pennsylvania provisions had been held unconstitutional by the Supreme Court. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). Thus, the Attorney General erred in stating that "[n]o better record could be made than that presented by plaintiffs in *Casey* . . . ." A.G. Supp. Br. at 6 n.4. Pennsylvania plaintiffs, who sought merely to meet their burden of proving infringement of a right under the strict scrutiny standard, made no effort to meet the "undue burden" standard, a standard then not yet the law of the land.

[27] In evaluating the other challenged provisions of the Pennsylvania law, this Court likewise evidenced a sensitivity to the factual record. Thus, in upholding the physician-only requirement for certain mandatory counseling provisions, *Casey* emphasized that "there is *no evidence on this record*" that the provision "would amount in practical terms to a substantial obstacle." *Id.* at 2824 (joint opinion) (emphasis added). In upholding Pennsylvania's record-keeping and reporting requirements for abortion, *Casey* recognized that "at some point increased cost" from such provisions "could become a substantial obstacle," but found there was "no such showing *on the record before us.*" *Id.* at 2833 (joint opinion) (emphasis added). Further, in sustaining Pennsylvania's

(continued...)

Even the separate opinions in *Casey* agreed that the joint opinion had adopted a fact-intensive standard for determining the facial constitutionality of abortion laws. For example, Justice Scalia criticized the joint opinion:

> We do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been appropriate . . . . [T]he "undue burden" standard may ultimately require the invalidation of each provision upheld today if it can be shown, on a better record, that the State is too effectively "express[ing] a preference for childbirth over abortion."

Id. at 2879-80 (Scalia, J., concurring in part and dissenting in part) (citations omitted).[28] Justice Blackmun described the joint opinion's fact-based standard in similar terms.[29] Thus, nearly

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[27] (...continued)
mandatory counseling requirements, *Casey* was careful to stress that the record evidence showed the required information was "truthful and not misleading." *Id.* at 2823 (joint opinion).

[28] Justice Scalia further noted:

> [I]n evaluating Pennsylvania's abortion law, the joint opinion relies extensively on the factual findings of the District Court, and repeatedly qualifies its conclusions by noting that they are contingent upon the record developed in this case. . . . Most significantly, the joint opinion's conclusion that the spousal notice requirement of the Act, see § 3209, imposes an "undue burden" is based in large measure on the District Court's "detailed findings of fact," which the joint opinion sets out at great length.

Id. at 2879-80 (Scalia, J., concurring in part and dissenting in part).

[29] [W]hile I believe that the joint opinion errs in failing to (continued...)

every member of this Court[30] recognized the integral relationship between factual evidence and the proper application of the "undue burden" standard.[31]

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[29] (...continued)

> invalidate the other regulations, I am pleased that the joint opinion has not ruled out the possibility that these regulations may be shown to impose an unconstitutional burden. The joint opinion makes clear that its specific holdings are based on the insufficiency of the record before it. I am confident that in the future evidence will be produced to show that "in a large fraction of the cases in which [these regulations are] relevant, [they] will operate as a substantial obstacle to a woman's choice to undergo an abortion."

Id. at 2845 (Blackmun, J., concurring in part and dissenting in part) (citations omitted); *id.* at 2852 n.9 (Blackmun, J., concurring in part and dissenting in part); *see also id.* at 2843 (Stevens, J., concurring in part and dissenting in part) ("The findings of the District Court established the severity of the burden that the 24-hour delay imposes on many pregnant women.").

[30] Although the court of appeals' decision is the first to utilize the "undue burden" standard since *Casey*, it is noteworthy that the Court of Appeals for the Eighth Circuit, which applied the standard prior to *Casey*, also treated it as a fact-based standard. In *Coe v. Melahn*, 958 F.2d 223 (8th Cir. 1992), the court of appeals reversed the entry of summary judgment for a plaintiff challenging a statutory restriction on insurance coverage for elective abortion. The plaintiff had submitted no evidence showing that the statute imposed an undue burden. *Id.* at 224. The court of appeals did not order dismissal of the complaint; instead, it remanded for further proceedings in the district court, reasoning that "[a]t this beginning stage of the proceedings," questions of fact precluded resolution of the case as a matter of law. *Id.* at 226.

[31] The Attorney General complains that consideration of relevant evidence in applying the undue burden standard will lead to "balkanization," that is, differing results in different cases. But as *Casey* itself pointed out:

(continued...)

Casey's emphasis on factual findings is not a novel approach. This Court has repeatedly recognized the importance of considering record evidence in facial challenges to onerous abortion laws. For example, in *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), this Court relied extensively on the district court's factual findings to strike down, on its face, Minnesota's requirement of two-parent notification without a judicial bypass.[32] Similarly, in *Akron I*, this Court's decision to strike down a second-trimester hospitalization requirement for abortion

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[31] (...continued)

> Even when jurists reason from shared premises, some disagreement is inevitable. *Compare Hodgson*, 497 U.S., at ___-___, 110 S. Ct., at ___-___, (opinion of KENNEDY, J.) with *id.*, at ___ -___, 110 S. Ct., at ___-___ (O' CONNOR, J., concurring in part and concurring in judgment in part). That is to be expected in the application of any legal standard which must accommodate life's complexity. We do not expect it to be otherwise with respect to the undue burden standard.

112 S. Ct. at 2821 (joint opinion).

[32] After setting out the factual record at length, *see id.* at 2938-41, this Court expressly relied on that record to find that the statute placed an unconstitutional burden on the right of privacy:

> *The record reveals* that in the thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family. *The testimony at trial established* that this requirement, ostensibly designed for the benefit of the minor, resulted in major trauma to the child, and often to a parent as well.

Id. at 2945 (emphasis added); *see also id.* at 2945 n.36 (citing trial testimony to support conclusion that most common reason for not notifying second parent was danger of physical abuse).

turned on the factual record.[33] *See also Bellotti*, 443 U.S. at 627-28, 631-32; *Colautti v. Franklin*, 439 U.S. 379, 395-96, 398-99 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52, 75-79 (1976).

Far from being limited to abortion cases, the imperative to consider the factual record cuts across this Court's constitutional precedents and is central to the process of judicial review of a constitutional question. As one member of this Court recently explained:

> We know of no support . . . for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature's judgment that the facts exist. If a legislature could make a statute constitutional simply by "finding" that black is white or freedom, slavery, judicial review would be an elaborate farce. At least since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), that has not been the law.

Lamprecht v. FCC, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (Opinion of Thomas, J.); *see also Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3011 (1990) (this Court does not

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[33] The record demonstrated that the provision placed

> a significant obstacle in the path of women seeking an abortion. . . . The Court of Appeals noted that there was testimony that a second-trimester abortion costs more than twice as much in a hospital as in a clinic. . . . Moreover, the court indicated that second-trimester abortions were rarely performed in Akron hospitals. . . . Thus, a second-trimester hospitalization requirement may force women to travel to find available facilities, resulting in both financial expense and additional health risk.

462 U.S. at 434-35 (citations and footnotes omitted); *see also id.* at 435-37 & nn. 22-25.

generally "'defer' to the judgment of [the legislature] . . . on a constitutional question.'") (quoting *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973)); *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring) ("where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity").[34]

The need for judicial consideration of the facts is particularly clear where, as here, the standard of review falls between the extremes of the "strict scrutiny" standard and the "rational basis" test. In those areas subject to some form of intermediate review, the applicable question is whether a particular statute imposes a burden that is sufficiently severe to render that statute unconstitutional.[35]

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[34] As this Court has stated:

> [T]he judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and whether the legislation is consonant with the Constitution. Were it otherwise, the scope of [fundamental rights] would be subject to legislative definition and the function of the [Constitution] as a check on legislative power would be nullified.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844 (1978).

[35] But even when the legislature is due the greatest deference -- i.e., where the so-called "presumption of constitutionality" is at its height -- this Court has scrutinized the facts meticulously before striking down legislation. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 444-45 (1978) (commerce clause review of highway safety regulation); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 678 (1981) (same) (citing "findings" of fact regarding "relative safety" and "substantiality of the burden on interstate commerce" as "controlling factors" in its decision). Similarly, where strict scrutiny applies, this Court has also scrutinized the facts material to the constitutional judgment at hand. *Landmark Communications*, 435 U.S.

(continued...)

For example, in its ballot access cases, this Court has examined, on a case-by-case basis, "the character and magnitude of the asserted injury to the rights protected" and the "precise interests put forward by the State as justifications." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *see also Burdick v. Takushi*, 112 S. Ct. 2059, 2064-66 (1992) (relying on evidence showing that Hawaii election code provides adequate ballot access to conclude that the ban on write-in voting "imposes only a limited burden on voters' rights"); *Mandel v. Bradley*, 432 U.S. 173, 177-79 (1977) (remand to assess burden placed by State's signature-gathering requirements on independent candidates). Similarly, in determining whether the right to marry has been infringed, this Court has undertaken a fact-based review to determine whether a particular law places a sufficient burden on protected rights. *Zablocki v. Redhail*, 434 U.S. 373, 386, 387 (1978). Indeed, in *Zablocki*, the Court distinguished the "directness and substantiality of the interference with the freedom to marry" at issue there from the burden imposed by the statute upheld in *Califano v. Jobst*, 434 U.S. 37 (1977), where there was "no evidence that the laws significantly discouraged, let alone made 'practically impossible,' any marriages." *Zablocki*, 434 U.S. at 387 n.12.

Further, when this Court has altered the appropriate legal principles, it has not hesitated to permit the parties to introduce evidence in an effort to obtain relief under the new standards. *See Lee v. International Society for Krishna Consciousness, Inc.*, 112 S. Ct. 2709, 2710 (1992) (Rehnquist, C.J., dissenting); *Mandel*, 432 U.S. at 178; *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 436 (1975). Similarly, where there are insufficient

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[35] (...continued)
at 843 ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 598-600 (1989) (scrutinizing factual record in determining whether government-sponsored creche violated Establishment Clause).

facts on central issues, this Court has remanded for further fact-finding. *See County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1671 (1991);[36] *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677-78 (1989). Where, as here, this Court has changed the standard of review from strict scrutiny to the less protective "undue burden" test, it must allow petitioners the opportunity to present facts relevant to this new standard.

C. In *Casey*, This Court Rejected The *Salerno* Analysis Adopted By The Court Of Appeals.

Relying on *United States v. Salerno*, 481 U.S. 739, 745 (1987), to support its conclusion that no remand for fact finding was necessary, the court of appeals parroted the statement that facial invalidity of a statute is only established when "'no set of circumstances exists under which the Act would be valid.'" 3a. *Salerno* may not, however, be used as an all-purpose foil to bar evidentiary proceedings and facial invalidation of a law restricting reproductive choice.[37]

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[36] Just as this Court has found that factual findings are critical in determining whether delays in making probable cause determinations violate the Constitution, *see McLaughlin*, 111 S. Ct. at 1671 (remanding for determination of whether county's procedures create greater delays than constitutionally permitted), so too must petitioners have an opportunity to show that Mississippi's delay exceeds constitutional limits.

[37] The facts of *Salerno* belie the broad implications of the court of appeals' mechanical reliance on this oft-quoted formulation. In *Salerno*, certain defendants challenged the provision of the Bail Reform Act of 1984 that allows for pre-trial detention based on future dangerousness. However, the defendants never "claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case." *Id.* at 745 n.3. In recognition of the general rules of standing, *Salerno* merely declined to invalidate the Act because it "might operate unconstitutionally under some conceivable set of circumstances" not applicable to the defendants in that case. *Id.* at 745.

Although this Court has relied on *Salerno* in several recent abortion cases, each has involved speculative challenges to statutory provisions in the absence of factual support. These cases have held only that facial challenges cannot prevail when based on an implausible statutory interpretation or "worst-case analysis that may never occur." *See, e.g., Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2981 (1990) ("*Akron II*").[38] By contrast, far from raising remote or speculative claims based on a hypothetical or "worst-case" scenario, petitioners here seek an opportunity to present evidence demonstrating that, in fact, the Act will impose an "undue burden" on Mississippi women seeking abortions.[39]

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[38] In *Akron II*, this Court rejected an argument that a judicial bypass procedure for a parental notice statute was not sufficiently expeditious. By interpreting the number of "days" required for the bypass to mean "business days," and reasoning that the bypass procedure could occur at a time of the year when it would encompass three Saturdays, three Sundays, and two legal holidays, the lower courts had calculated that the procedure could take up to 22 calendar days. *Id.* at 2980. This Court held, however, that "the mere possibility that the procedure may require up to twenty-two days in a rare case is plainly insufficient to invalidate the statute on its face." *Id.* at 2981. *See also Webster v. Reproductive Health Servs.*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring) (rejecting challenge to Missouri's ban on the use of public facilities in the performance of abortions, which was based on the contention that the statute could be applied "against private hospitals using public water and sewage lines, or against private hospitals leasing state-owned equipment or state land").

[39] Particularly here, where the petitioners' complaint and preliminary affidavits are more than sufficient to state a claim for relief, rejection of petitioners' claims is inappropriate. On a motion to dismiss, it is assumed that unless "as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved,'" dismissal is not granted. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (quoting *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984)); *Conley v. Gibson* 355 U.S. 41, 45-46 (1957).

Moreover, an application of *Salerno* similar to that adopted by the court of appeals was explicitly rejected by this Court in *Casey*:

> Respondents attempt to avoid the conclusion that § 3209 [the husband notification requirement] is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. . . . Respondents argue that . . . the statute affects fewer than one percent of women seeking abortions. For this reason, it is asserted, the statute cannot be invalid on its face.[40] *We disagree with respondents' basic method of analysis*.
>
> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant. . . .
>
> . . . The unfortunate yet persisting conditions we document above will mean that *in a large fraction of the cases in which § 3209 is relevant it will operate as a substantial obstacle* to a woman's choice to undergo an abortion.

Casey, 112 S. Ct. at 2829-30 (emphasis added) (citations omitted). By contrast, the dissenting Justices would have followed the approach adopted by the court of appeals in this case and required plaintiffs challenging abortion restrictions to "show that no set of circumstances exists under which the

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[40] See Brief of Respondents at 83-92, *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (Nos. 91-744, 91-902); Brief of the United States as Amicus Curiae at 19, *Casey* (Nos. 91-744, 91-902); Tr. of Oral Aug. at 28-29, 36, 39.

[provision] would be valid." *Id.* at 2870 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting *Akron II*, 110 S. Ct. at 2980-81).[41] *See also id.* at 2870 n.2 (complaining that the "joint opinion of Justices O'CONNOR, KENNEDY, and SOUTER appears to ignore this point in concluding that the spousal notice provision imposes an undue burden on the abortion decision"); *id.* at 2854 (Blackmun, J., concurring in part and dissenting in part) (the Chief Justice's proposed test would be an "insurmountable requirement for facial challenges"). Thus, continued reliance by the court of appeals on the *Salerno* formulation is misplaced, necessitating review by this Court.

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[41] The court of appeals recognized that this Court in *Casey* applied "a somewhat different standard," 3a n.2, but summarily concluded that this standard was limited to review of spousal notification statutes, reasoning that this Court could not have overruled *Salerno sub silentio*. 3a n.2. The real issue, however, is the meaning of the *Salerno* formulation and when it is applicable.

CONCLUSION

To ensure that *Casey* is not merely a mirage of constitutional protection and to avoid grievous and irreparable harms to women seeking abortions, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Helen B. BARNES, M.D., et al.,
Plaintiffs-Appellees,

v.

Mike MOORE, Attorney General of the State of Mississippi and his employees, agents and successors,
Defendants-Appellants.

No. 91-1953.

Aug. 17, 1992.

Appeal from the United States District Court for the Southern District of Mississippi.

Before REYNOLDO G. GARZA, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:

On August 5, following oral argument earlier that day in this appeal from the district court's preliminarily enjoining enforcement of the Mississippi Informed Consent to Abortion Act, we vacated the injunction, stating that we would file an opinion, to include further disposition of this appeal. Pursuant to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992), we hold that the Act is facially constitutional. Accordingly, this case is REMANDED to the district court for entry of an order of dismissal.

I.

In March 1991, the Mississippi Legislature enacted the Informed Consent to Abortion act, Miss. Code Ann. §§ 41-41-31, *et seq.*, effective that July. That May, the plaintiffs (abortion clinics and physicians who perform abortions or provide abortion referral services) filed suit, asserting that the Act is unconstitutional on its face, and seeking, *inter alia*, immediate injunctive relief. Although the Act was to become effective on July 1, the Mississippi Attorney General agreed to suspend enforcement until September 1. After two days of evidentiary hearings on plaintiffs' motion for a preliminary injunction, the district court, on August 30, two days before the Act was to become effective, granted the injunction, "suspending the effective date and enforcement" of the Act. It so ruled because of controlling Supreme Court precedent.

While this appeal from that injunction was pending, the Supreme Court rendered a decision in *Casey* on the facial challenge to the Pennsylvania Abortion Control Act, upholding the informed consent, 24-hour waiting period, parental consent, and reporting and recordkeeping provisions, but striking down the spousal notification provision. The judgment was announced in a joint opinion by Justices O'Connor, Kennedy, and Souter. The parties to this appeal then filed supplemental briefs on the effect of *Casey*.

II.

The Mississippi Act's informed consent and 24-hour waiting period provisions are substantially identical to similar provisions of the Pennsylvania Act at issue in *Casey;* but, unlike the Pennsylvania Act, Mississippi's does not contain spousal notification (struck down in *Casey*), parental consent, and reporting and recordkeeping provisions. Accordingly, as plaintiffs essentially conceded at oral argument, they cannot now meet the well-established four-part test for obtaining a preliminary injunction, including showing a substantial likelihood

of success on the merits.[1] Therefore, we vacated the preliminary injunction. In any event, plaintiffs have raised a host of challenges to the Mississippi Act, in an attempt to distinguish it from the Act upheld in *Casey*, resulting in our either remanding for further proceedings or holding against the facial challenge and remanding for entry of an order of dismissal.

Because the plaintiffs are challenging the facial validity of the Mississippi Act, they must "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987); *Casey*, ___ U.S. at ___, 112 S.Ct. at 2870 (Rehnquist, C.J., dissenting in part).[2] In light of *Casey's* holding substantially identical provisions of the Pennsylvania Act facially constitutional, the plaintiffs cannot satisfy this "heavy burden". *Salerno*, 481 U.S. at 745, 107 S.Ct. at 2100.

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[1] The four prerequisites [for the extraordinary relief of preliminary injunction] are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to the plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest. *Canal Authority v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974).

[2] The *Casey* joint opinion may have applied a somewhat different standard in striking down the spousal notification provision of the Pennsylvania Act, not in issue here. ___ U.S. at ___, 112 S.Ct. at 2829; *see also id.* at ___ & n. 2, 112 S.Ct. at 2870 & n. 2 (Rehnquist, C.J., dissenting in part). Nevertheless, we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes.

A.

Section 41-41-33 of the Mississippi Act requires the physician to inform the patient of medical risks of abortion "including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility"; the probable gestational age of the fetus; and the "medical risks associated with carrying her child to term". That section further requires that the patient be informed, by a physician or physician's agent, "[t]hat medical assistance benefits may be available for prenatal care, childbirth and neonatal care"; "[t]hat the father is liable to assist in the support of her child"; that there are available private and public services for pregnancy prevention counseling; and that she has a right to review printed materials provided by the State which describe the stages of fetal development and list agencies that offer alternatives to abortion. Those printed materials are to be "objective, nonjudgmental, and designed to convey only accurate information", § 41-41-35; and the Act expressly permits the physician or agent to comment, or refrain from comment, on them. Section 41-41-33(b)(iv).

The Mississippi Act requires a 24-hour waiting period between the disclosure of information and performance of an abortion, except for a "medical emergency". Section 41-41-33. And, a physician convicted of "purposefully, knowingly or recklessly" performing an abortion in violation of the Act is guilty of a misdemeanor, punishable by fine or imprisonment for up to six months. Section 41-41-39.

B.

1.

As stated, plaintiffs' post-*Casey* facial challenge primarily keys on specific differences between the Mississippi and Pennsylvania Acts. For example, the Pennsylvania Act contains an exception to the penalty for violating the informed consent requirements if the physician "can demonstrate, by a preponderance of the evidence, that he or she reasonably believed

that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient". 18 Pa.Cons.Stat.Ann. § 3205 (Supp. 1992). This exception is not found in the Mississippi Act. As another example, the Acts differ in some respects in defining "abortion" and "medical emergency".[3] We do not find merit in any of the facial

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[3] The Mississippi Act defines "abortion" as

> the use or prescription of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth or to remove a dead fetus.

Miss.Code Ann. § 41-41-31(a) (Supp. 1991).

The Pennsylvania Act defines it as follows:

> The use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child except that, for the purposes of this chapter, abortion shall not mean the use of an intrauterine device or birth control pill to inhibit or prevent ovulation, fertilization of the implantation of a fertilized ovum within the uterus.

18 Pa.Cons.Stat.Ann. § 3203 (1983).

> The Mississippi Act defines "medical emergency" as that condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate an immediate abortion to avert the death of the mother or for which a twenty-four-hour delay will create grave peril of immediate and irreversible loss of major bodily function.

Miss.Code Ann. § 41-41-31(b) (Supp. 1991).

The Pennsylvania Act defines it as follows:

> That condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the

(continued...)

challenges, including to the definition of a "medical emergency".

In defining that term, the Mississippi Act uses the phrase "grave peril of immediate and irreversible loss of major bodily function", § 41-41-31(b); Pennsylvania, "serious risk of substantial and irreversible impairment of major bodily function", § 3203. Nevertheless, the Mississippi Act allows physicians to rely on their "best clinical judgment", § 41-41-31(b); and they are subject to criminal penalties only if they "purposefully, knowingly, or recklessly" violate the Act, § 41-41-39. We conclude, as the Third Circuit did in *Casey*, that the Mississippi Legislature's intent in drafting that provision was to assure that compliance with the Act would not pose a significant threat to the life or health of women seeking abortions. *See Casey*, ___ U.S. at ___, 112 S.Ct. at 2821.

2.

Plaintiffs contend, however, that this case should be remanded for further evidentiary proceedings, so that they can attempt to prove that, on its face, the Mississippi Act poses an "undue burden" on women seeking abortions in Mississippi, even though the Supreme Court has held that substantially identical requirements do not constitute an undue burden on women seeking abortions in Pennsylvania.[4] They correctly note that the

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[3] (...continued)

> immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

18 Pa.Cons.Stat.Ann. § 3203 (Supp. 1992).

[4] The *Casey* joint opinion defined an "undue burden" as follows:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle

(continued...)

authors of the *Casey* joint opinion made repeated references to the evidence in the record and the findings of fact by the district court in Pennsylvania. *See, e.g.*, ___ U.S. at ___-___, 112 S.Ct. at 2823-27. However, in clarifying what they meant by an "undue burden", the authors of the joint opinion stated that they were "set[ting] forth a standard of general application". *Id.* at ___, 112 S.Ct. at 2820. Applying that standard, we conclude that the differences between the Mississippi and Pennsylvania Acts are not sufficient to render the former unconstitutional on its face.[5] Further evidentiary proceedings would not affect that conclusion.

III.

We earlier VACATED the preliminary injunction. For the foregoing reasons, we REMAND this case to the district court for entry of an order of dismissal.

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[4] (...continued)

> in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a women's choice cannot be considered a permissible means of serving its legitimate ends.

___ U.S. at ___, 112 S.Ct. at 2820.

[5] In their post-*Casey* supplemental brief, plaintiffs reduce their argument to the aphorism "Mississippi ain't Pennsylvania", stating, "The record in this case proves what all know empirically: Mississippi ain't Pennsylvania." This speaks volumes about the invalidity of their challenge to the Mississippi Act on its face; in fact, no more really need be said.

Filed August 5, 1992

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-1953

HELEN B. BARNES, M.D., ET AL.

Plaintiffs-Appellees,

VERSUS

MIKE MOORE, Attorney General
of the State of Mississippi and
his employees, agents and successors,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Mississippi
(J91-0245(W))

BEFORE REYNALDO G. GARZA, DAVIS, and BARKSDALE, Circuit Judges.
PER CURIAM:

The Preliminary injunction entered in this action on August 30, 1991, is **VACATED**. An opinion, including further disposition of this appeal, will be rendered hereafter.

Filed August 30, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HELEN B. BARNES, M.D.; JOSEPH MITCHELL, M.D.; JOSEPH BOOKER, M.D., ON BEHALF OF THEMSELVES, THEIR PATIENTS AND ALL OTHER SIMILARLY SITUATED; NEW WOMAN MEDICAL CENTER, INC.; MISSISSIPPI WOMEN'S MEDICAL CENTER

PLAINTIFFS

v. CIVIL ACTION NO. J91-0245(W)

MIKE MOORE, AS ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI AND HIS EMPLOYEES, AGENTS AND SUCCESSORS

DEFENDANT

ORDER GRANTING PRELIMINARY INJUNCTION

Before the court is a motion of the plaintiffs in the above styled and numbered cause for a preliminary injunction seeking declaratory and injunctive relief. The parties appeared before the court on August 28 and 29, 1991. Affidavits and briefs had been previously presented in support of the parties' respective arguments and legal positions. The issue to be decided is whether House Bill 982 (Mississippi Regular Session 1991) which requires physicians under threat of criminal penalty to wait twenty-four (24) hours after providing certain information violates fundamental rights secured by the Constitution of the United States. Hence, the court is faced with the two-fold question of whether the State can mandate a twenty-four hour waiting period before an abortion can be performed, and whether the State may require that certain information be given by a physician before a woman's informed consent can be obtained. The court has heard five witnesses, two on behalf of the plaintiffs

and three on behalf of the defendant, four of whom are physicians practicing obstetrics and gynecology, and one registered nurse. The court finds that the facts of this case warrant the issuanceof a preliminary injunction. In reaching this conclusion, the court has considered the factors set out in Canal Authority v. Callaway, 489 F.2d 567 (5th Cir. 1974):

> (1) a substantial likelihood that plaintiff will prevail on the merits,
>
> (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted,
>
> (3) that the threatened injury to the plaintiff outweighs the threatened harm the injunction may do to the defendant, and
>
> (4) that granting the preliminary injunction will not disserve the public interest.

See Plains Cotton Cooperative Association v. Goodpasture Computer Services, Inc., 807 F.2d 1256, 1259 (5th Cir. 1987); Mississippi Power and Light v. United Gas Pipe line, 760 F.2d 618 (5th Cir. 1985).

SUBSTANTIAL LIKELIHOOD OF SUCCESS

SECTION 2 of House Bill 982 provides that no abortion shall be performed without the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in case of a medical emergency, voluntary and informed consent can only be obtained if the attending or referring physician relates the following information to the patient: (1), the name of the performing physician; (2), the particular medical risks associated with the abortion procedure; (3), the probable gestational age of the unborn chid at the time the abortion is to be performed; and, (4) the medical risks associated with carrying her child to term, at least twenty-four hours prior to the abortion. Additionally, the woman must be

told by the physician or the physician's agent at least twenty-four hours prior to the abortion (a) that medical assistance benefits may be available, (b) that the father is liable to assist in the support of the child, (c) that services are available which provide for pregnancy prevention, and (d) that she has a right to review certain printed materials promulgated in accordance with House Bill No. 982.

The court concludes that the twenty-four hour waiting period and the physician-only disclosure requirement are issues governed by the United States Supreme Court decision in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). In Akron the Supreme Court addressed a twenty-four waiting period which only could be circumvented upon written certification of the attending physician that there is an emergency need for an abortion. The Akron Court could find "no medical basis" for the twenty-four hour waiting period, and the Justices stated that:

> [w]e find that Akron has failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence suggesting that the abortion procedure will be performed more safely. Nor are we convinced that the State's legitimate concern that the woman's decision to be informed is reasonably served by requiring a 24-hour delay as a matter of course. The decision whether to proceed with an abortion is one as to which it is important to "affor[d] the physician adequate discretion is the exercise of his medical judgment." [Citation omitted] In accordance with the ethical standards of the profession, a physician will advise the patient to defer the abortion when he thinks it will be beneficial to her. But ifa woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision.

City of Akron v. Akron Center, supra, 103 S.Ct. at page 2503.

The Akron case also addressed the physician-only disclosure requirement, concluding, "that it was 'unreasonable for a State to insist that only a physician is competent to provide the information and counseling relevant to informed consent since the State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it. Id., 103 S.Ct. at page 2502.

The United States Supreme Court, in Akron, recognized that the State has a legitimate interest in ensuring informed consent by "requir[ing] that a physician make certain that his patient understands the physical and emotional implications of having an abortion." Id., 103 S.Ct. at page 2500. However, this same Court has also held, "rigid requirements that a specific body of information be imparted to a woman in all cases, regardless of the needs of the patient, improperly intrudes upon the discretion of the pregnant woman's physician and thereby imposes an 'undesired and uncomfortable straitjacket'." Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 762, 106 S.Ct. 2169, 2179, 90 L.Ed.2d 779 (1986). A state, under the guise of informed consent requirements, "may not require the delivery of information designed 'to influence the woman's informed choice between abortion and childbirth'." Thornburgh, supra, 106 S.Ct. at page 760; Akron, supra, at page 2500; Planned Parenthood v. Casey 744 F.Supp. 1323, 1380 (E.D.Pa. 1990).

The court finds that the plaintiff's have adequately shown a probable likelihood of success on the merits of their case inasmuch as the court is persuaded that the aforesaid Supreme Court decisions are controlling with regard to the issues of the twenty-four hour waiting period, physician-only disclosure requirements and specific content requirements. The United States Supreme Court has reserved for itself the prerogative of overruling its own decisions. Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989). Furthermore, it has

not refrained from reconsideration of a prior construction of the Constitution that has proved "unsound in principle and unworkable in practice." Webster v. Reproductive Health Services, ___ U.S. ___, 109 S.Ct. 3040, 3056, 106 L.Ed.2d 410 (1989). To date, the Supreme Court has not renounced its holdings in Akron and Thornburgh. Therefore, inasmuch as this court must follow Supreme Court precedent, the court concludes that the plaintiffs have met the requirement under Canal Authority, supra, to show a substantial likelihood of success on the merits.

IRREPARABLE HARM, BALANCE OF HARMS AND PUBLIC INTEREST

Irreparable harm is harm which cannot be undone. Parks v. Dunlop, 517 F.2d 785, 787 (5th Cir. 1975). For an injury to be irreparable for the purposes of preliminary injunctive relief, it must be such as cannot be undone by an award of a monetary remedy. Deerfield Medical center v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981). Perhaps the single most important requisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered. Violation of a constitutional right, even for minimal periods of time, is irreparable harm. One who shows deprivation of a constitutional right need go no further in showing the requisite harm for injunctive relief. See Elrod v. Burns, 427 U.S. 347, 374, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976); Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983); Deerfield, supra; Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978).

The court finds that the balance of harms favors the plaintiffs in this case and that the public interest requires intervention by the court in the form of preliminary injunctive relief restraining the implementation of House Bill No. 982 (Mississippi Regular Session 1991).

The court reminds the parties that findings of fact and conclusions of law which dispose of a request for a preliminary injunction are not binding at trial on the merits. Mylette v. Jeane, 910 F.2d 296, 299 (5th Cir. 1990); University of Texas v. Camenisch, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). What has so far transpired is nothing more than a truncated version of what will be more fully developed at trial.

The preliminary injunction requested by the plaintiffs suspending the effective date and enforcement of House Bill No. 982 (Mississippi Session 1991) is hereby granted.

SO ORDERED this the 30th day of August, 1991.

/s/ Henry T. Wingate
UNITED STATES DISTRICT JUDGE

Barnes v. Moore J91-0245(W)
Preliminary Injunction granted

MISSISSIPPI HOUSE BILL NO. 982,
CH. 439, 1992 MISS. LAWS 370
Miss. Code Ann.

§ 41-41-31. Definitions.

The following words and phrases shall have the meanings ascribed in this section unless the context clearly indicates otherwise:

(a) "Abortion" means the use or prescription of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth or to remove a dead fetus.

(b) "Medical emergency" means that condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate an immediate abortion to avert the death of the mother or for which a twenty-four-hour delay will create grave peril of immediate and irreversible loss of major bodily function.

(c) "Probable gestational age of the unborn child" means what, in the judgment of the attending physician, will with reasonable probability be the gestational age of the unborn child at the time the abortion is planned to be performed.

§ 41-41-33. Consent; written certification.

No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(a) The woman is told the following by the physician who is to perform or induce the abortion or by the referring physician, at least twenty-four (24) hours before the abortion:

(i) The name of the physician who will perform or induce the abortion;

(ii) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility;

(iii) The probable gestational age of the unborn child at the time the abortion is to be performed or induced; and

(iv) The medical risks associated with carrying her child to term.

(b) The woman is informed, by the physician or his agent, at least twenty-four (24) hours before the abortion:

(i) That medical assistance benefits may be available for prenatal care, childbirth and neonatal care;

(ii) That the father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion;

(iii) That there are available services provided by public and private agencies which provide pregnancy prevention counseling and medical referrals for obtaining pregnancy prevention medications or devices; and

(iv) That she has the right to review the printed materials described in Section 41-41-35. The physician or his agent shall orally inform the woman that the materials have been provided by the State of Mississippi and that they describe the unborn child and list agencies that offer alternatives to abortion. If the woman chooses to view the materials, copies of them shall be furnished to her. The physician or his agent may disassociate himself or themselves from the materials, and may comment or refrain from comment on them as he chooses.

(c) The woman certifies in writing before the abortion that the information described in paragraphs (a) and (b) of this section has been furnished to her, and that she has been informed of her opportunity to review the information referred to in subparagraph (iv) of paragraph (b) of this section.

(d) Before the abortion is performed or induced, the physician who is to perform or induce the abortion receives a copy of the written certification prescribed by this section.

§ 41-41-35. Duties of State Department of Health; printed materials.

(1) The State Department of Health shall cause to be published in English within sixty (60) days after July 1, 1991, the following easily comprehensible printed materials:

(a) Geographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including adoption agencies, which shall include a comprehensive list of the agencies available, a description of the services they offer and a description of the manner,

including telephone numbers, in which they might be contacted, or, at the option of the Department of Health, printed materials including a toll-free, twenty-four-hour-a-day telephone number which may be called to obtain, orally, such a list and description of agencies in the locality of the caller and of the services they offer.

(b) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from the time when a woman can be known to be pregnant to full term, including any relevant information on the possibility of the unborn child's survival. The materials shall be objective, nonjudgmental and designed to convey only accurate scientific information about the unborn child at the various gestational ages.

(2) The materials shall be printed in a typeface large enough to be clearly legible.

(3) The materials required under this section shall be available at no cost from the Department of Health upon request and in appropriate number to any person, facility or hospital.

§ 41-41-37. Physician to inform woman of medical emergency.

When a medical emergency compels the performance or induction of an abortion, the physician shall inform the woman, before the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or for which a twenty-four-hour delay will create grave peril of immediate and irreversible loss of major bodily function.

§ 41-41-39. Violation of provisions as misdemeanor.

Anyone who purposefully, knowingly or recklessly performs or attempts to perform or induce an abortion without complying

with sections 41-41-31 through 41-41-37 shall, upon conviction, be guilty of a misdemeanor and shall be punished by a fine of One Thousand Dollars ($1,000.00), by imprisonment in the county jail for a period of time not to exceed six (6) months or both such fine and imprisonment.

VETO MESSAGE TO THE MISSISSIPPI HOUSE OF REPRESENTATIVES ON HOUSE BILL NO. 982 OF GOVERNOR RAY MABUS (Mar. 27, 1991)

MISSISSIPPI
EXECUTIVE DEPARTMENT
JACKSON

March 27, 1991

TO THE MISSISSIPPI HOUSE OF REPRESENTATIVES:

I return herewith House Bill Number 982 "AN ACT TO REQUIRE INFORMED WRITTEN CONSENT BEFORE THE PERFORMANCE OR INDUCTION OF AN ABORTION; TO REQUIRE CERTAIN INFORMATION REGARDING ABORTION AND ALTERNATIVES TO ABORTION TO BE PROVIDED TO THE WOMAN AT LEAST 24 HOURS BEFORE AN ABORTION; TO REQUIRE CERTAIN INFORMATION TO BE GIVEN TO THE WOMAN IN CASES OF MEDICAL EMERGENCIES; TO PROVIDE PENALTIES FOR VIOLATIONS OF THIS ACT; AND FOR RELATED PURPOSES"; without my approval, and in so doing respectfully assign the following reason for veto:

This bill is not about information or consent. This bill is about who makes a most personal, intimate decision: politicians or a woman with her family, her doctor, and her God. In vetoing this bill, I affirm my belief that the first responsibility of government is to protect rather than to invade privacy and the family.

I fully support the position of the Mississippi Medical Association, which strongly urged me to veto this bill. The Association says this bill would do irreparable harm to the doctor-patient relationship. Mississippi already has a strict informed consent law for all medical procedures, which makes

this bill unnecessary. Under threat of criminal penalty, this bill substitutes the preferences of politicians for professional medical judgments. In vetoing this bill, I affirm my belief that government should not intrude into this relationship or replace a doctor's trained judgment with that of politicians.

Finally, this bill, under any reading of recent United States Supreme Court and other court decisions, is clearly unconstitutional. It would subject the State to a long, expensive, and losing lawsuit.

It is for this reason that I herewith return House Bill Number 982 without my signature.

Respectfully submitted,

/s/

RAY MABUS
Governor

DECLARATIONS FILED IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FOR A STAY OF MANDATE AND INJUCTION PENDING REVIEW OF PETITION FOR A WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

DECLARATION OF JACQUELINE DARROCH FORREST, Ph.D.

JACQUELINE DARROCH FORREST, Ph.D, deposes and says the following:

1. I am the Vice President for Research at the Alan Guttmacher Institute (AGI) in New York City. A copy of my curriculum vitae is attached hereto as Exhibit A. AGI is an independent non-profit corporation involved in research, policy analysis, and public education in the field of reproductive health care. AGI collects original data on the delivery of family planning and abortion services in the United States. AGI statistics have, since 1975, been accepted by the Census Bureau as the most complete statistics on abortion in the United States, and are published each year in the Statistical Abstract of the United States. The United States Centers for Disease Control, which is part of the Department of Health and Human Services, also publishes abortion statistics but acknowledges that AGI statistics are more complete.

2. As Vice President for Research, I supervise the Research Division and conduct research of my own. I am part of the executive staff of AGI, and I participate in its management and policy decisions.

3. I have authored or co-authored over sixty-five journal articles, eleven books, ten chapters in books compiled by others, ten reports, and one hundred papers and presentations in the reproductive health field. I have testified on reproductive health

issues before five Congressional Committee hearings, three Food and Drug Administration Committee hearings, and the Pennsylvania House Committee on Health and Welfare. I have also participated in a briefing on reproductive health issues before the Republican Senate staff, and in a presentation at the Congressional Coalition on Population and Development. I have previously testified in person or by affidavit in seven court cases regarding reproductive health issues.

4. I submit this Declaration in support of Plaintiffs-Appellees' Motion for an Injunction Pending Review on Certiorari against Mississippi House Bill 982 (Regular Session 1991) ("the Act").

5. I have read the Act at issue in this case. It is my professional opinion that, in part because of the effect of the demographics and geography of health care in Mississippi, the Mississippi Act places singularly heavy burdens in the path of Mississippi women who need abortions.

6. Mississippi has proportionately few abortion providers. Mississippi has one provider for every 149,000 women, a ratio significantly worse than many if not most other states in the nation.

7. The providers in Mississippi are more concentrated geographically than the national average. Eighty of Mississippi's 82 counties have no known abortion provider. Thus, while 2% of Mississippi counties have at least one abortion provider, nationally, as of 1988, 17% of counties had at least one provider. Henshaw & Van Vort, Abortion Services in the United States, 1987 and 1988, 22 Fam. Plan Persp. 102 at Table 5 (1990). Based on 1990 populations, approximately 517,000 women aged

15-44, or 86% of all women 15-44, live in the 80 counties with no providers. By contrast, as of 1988 only 31% of women 15-44 nationally lived in a county with no provider. Id. 326,000 Mississippi women, or 55% of all women aged 15-44, live more than 50 miles from a county with a provider, including counties in neighboring states. (Distances were measured from county seat to county seat, as the crow flies.)

8. As a result, more than half of all women in Mississippi must travel great distances to obtain abortions. Mississippi Health Department statistics indicate that in 1990, at least 67% of Mississippi residents who obtained abortions in Mississippi went out of their counties of residence to do so, whereas it is estimated that as of 1987 only 35% of women nationally who obtained abortions in their home state travelled out of county to do so, Henshaw, The accessibility of abortion services in the United States, 23 Fam. Plan. Persp. 248 (1991). This figure does not include the large number of Mississippi residents who went out of state for abortion services. As of 1987, for example, 32% of Mississippi residents crossed state lines to obtain their abortion compared to 6% of U.S. women who crossed state lines. Henshaw, Koonin & Smith, Characteristics of U.S. Women Having Abortions, 1987, 23 Fam. Plan. Persp. 75, 80 Table 6 (1991).

9. In response to a recent survey of abortion providers conducted by the Alan Guttmacher Institute, two large providers in Mississippi indicated that in 1988 close to half of their abortion patients traveled more than 100 miles for service. Whereas only an estimated 9% of women nationally travelled over 100 miles to obtain outpatient abortion services, in fact in the East South Central region, of which Mississippi is a part, 20% of women travelled more than 100 miles; this is the highest proportion of all regions. Henshaw, The accessibility of abortion services in the United States, 23 Fam. Plan. Persp. 248 (1991).

10. The burdens associated with travel on women seeking abortions are well-established. Although many women will travel great distances in order to obtain safe, legal abortions, a 1976

study showed clearly that "the farther a woman has to travel to obtain an abortion, the less likely she is to obtain one." Shelton, Brann & Shulz, Abortion Utilization: Does Travel Distance Matter?, 8 Fam. Plan. Persp. 260, 262 (1976) (hereinafter "Shelton"). (This study considered the relationship of abortion rates in Georgia to distance from Atlanta where the major abortion providers were located.)

11. Because under the Act, women have to be given certain prescribed information by a physician familiar with abortion practice before waiting out the statutory 24-hour period, many women will have to make two trips to the nearest provider of abortion services. Where multiple trips may be necessary, the burdens of travel are that much more severe. See Lupfer & Silber, How Patients View Mandatory Waiting Periods for Abortion, 13 Fam. Plan. Persp. 75, 77 (1981). Because a very high proportion of Mississippi women travel long distances, the act will cause a great proportion of Mississippi women to be unable to make the multiple trips that the Act requires.

12. The burdens of increased time and money imposed by travel fall disproportionately on the poorest, youngest and least sophisticated women. AGI, Abortion 1974-1975: Need and Services in the United States, Each State and Metropolitan Area 41 (1976). In 1989, Mississippi's per capita personal income was $11,724. See U.S. Department of Commerce, Statistical Abstract of the United States, 1991 at 432 (Table 713). In addition, the 1989 median household income in Mississippi was the lowest in the nation at $20,136. See Children's Defense Fund, Child Poverty Data from 1990 Census (1992). Thus, the increased travel burdens imposed by the Act fall upon a group of women, who, on average, are substantially poorer than in any other state. The result is greater hardships on a larger proportion of Mississippi women.

13. In 1988, of all mothers in Mississippi having their first child, 38% were teenagers; this percentage was the highest of any state in the country. Charles Stuart Mott Foundation, A State by State Look at Teenage Childbearing in the U.S. (1991).

The 1985 pregnancy rate for women 15-19 was comparable for Mississippi and the U.S. as a whole, yet the 1985 abortion rate was 19 per 1000 women 15-19 compared to an abortion rate of 44 per 1000 women in this age bracket nationally. S. Henshaw et al., Teenage Pregnancy in the United States (The Alan Guttmacher Institute, New York, 1989) (Table 11).

14. Equally important, however, is the fact that 33.5% of children under 18 in Mississippi are considered poor by federal census takers. Children's Defense Fund, Child Poverty Data from 1990 Census (1992). Mississippi has the highest percentage of children living in poverty in the nation. Id.

15. To avoid multiple trips under the Act, a woman would have to stay overnight, necessitating additional costs and almost certainly compelling her to forego privacy and confidentiality by making it difficult to explain her overnight absence to family, friends, employers and others. This burden falls disproportionately on victims of domestic violence, rape and incest.

16. The need to travel long distances also causeswomen to delay obtaining abortions. One study found that women who travel to another county for abortions are delayed an average of 4.7 days when other characteristics (age, education, race, marital status, previous abortions and number of children) are taken into account. Henshaw & O'Reilly, Characteristics of Abortion Patients in the United States, 1979 and 1980, Fam. Plan. Persp. 5, 14 (1983).

17. Many women already delay seeking abortion until after twelve weeks of pregnancy. There are several reasons for this. Some women, particularly those whose menses are irregular, recognize that they are pregnant only after several weeks or even months of gestation. Some have medical reasons that delay their decision. Others have late abortions because they cannot pay for the procedure earlier or have difficulty locating a provider and making transportation and other arrangements to get to the provider. Torres & Forrest, Why Do Women Have Abortions?,

20 Fam. Plan. Persp. 169, 174-75 (1988).

18. Any delay in obtaining abortion is significant because gestational age is an important determinant of medical risk. Although abortion is one of the safest surgical procedures and is associated with no more risk of fatal complications than even a shot of penicillin, both the morbidity and mortality rates for abortion increase with advancing gestational age.

19. At thirteen to fifteen weeks gestation, the risk of death is nine times as great as for an abortion performed at eight weeks or earlier, and abortions at sixteen to twenty weeks carry a nineteen times greater risk of death, although the risk of mortality for the procedure is still small. Gold, Abortion and Woman's Health 29 (The Alan Guttmacher Institute 1990).

20. There is also a 20% increase in risk of morbidity with each week after the eighth week of pregnancy. Tietze & Henshaw, Induced Abortion: A World Review, 1986, (The Alan Guttmacher Institute 1986) (Table 16).

21. For minors, the impact of delay on increased risk is even more pronounced. This is because minors already tend to seek abortions later in pregnancy than adults because of delay in discovering their pregnancies and fear of telling their parents or partner that they are pregnant. Torres & Forrest, Why Do Women Have Abortions?, 20 Fam. Plan. Persp. 169-176 (1988).

22. One important consequence of delay in Mississippi may well be no in-state abortion services at all for women who are delayed past the end of the 15th week of gestation. At present, it is nearly impossible to obtain a post-16 week abortion due in large part to a recently enacted clinic licensing law that has, at least pending judicial review, resulted in terminating this service at two of the only three clinics in the state.

23. For the foregoing reasons, it is my opinion that Mississippi's 24 hour waiting period will impose singularly harsh burdens on Mississippi women seeking abortions. Indeed, while the true effects of the law will not surface statistically for many months, it is likely to prevent a large percentage of women who want abortions from getting them and force many women in Mississippi to get later, riskier abortions.

WHEREFORE plaintiffs-appellees motion for an injunction pending review on certiorari should be granted.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 4, 1992

/s/
Jacqueline Darroch Forrest, Ph.D.

DECLARATION OF THOMAS W. TUCKER, II, M.D.

Thomas W. Tucker, II, M.D. deposes and says the following:

1. I am a physician licensed to practice medicine in the States of Alabama and Mississippi. In addition to my practice in Alabama, I currently provide abortion and office gynecological services at the Tri-State Women's Medical Clinic in Southaven, Mississippi and at the Mississippi Women's Medical Clinic in Jackson, Mississippi, a plaintiff-appellee in this action.

2. I had a full ob-gyn practice from 1976 to approximately 1984 in Alabama. In approximately 1984, I began to specialize in outpatient abortion and office gynecological services and it was at that time that I began practicing in Mississippi as well. A copy of my curriculum vitae is attached as Exhibit A.

3. I submit this declaration in support of the motion of plaintiffs-appellees for an injunction pending review on certiorari in the United States Supreme Court.

4. Because I still practice medicine in Alabama as well, my clinic hours in Mississippi are limited. I am at the clinic in Southaven on Tuesday afternoon and Wednesday morning and then again on Friday afternoon and Saturday morning. I am at the clinic in Jackson on Wednesday afternoon and again on Saturday afternoon. In addition, a physician from Arkansas drives to Jackson once each week to cover patients for me at the Jackson clinic on Friday afternoon.

5. These two clinics constitute two of the only three clinics currently providing abortion services in the State of Mississippi. To my knowledge, the only other facility providing outpatient abortion services is the New Woman Medical Center in Jackson.

6. Over the last several years, I would estimate that I performed an average of a little over 60 abortions per week at the Southaven facility and an average of between 50 and 60 abortions per week at the Jackson facility.

7. Some of these women drive four or five hours for their appointments. They travel from Louisiana, Tennessee, Arkansas, Alabama and southern Mississippi.

8. I was informed by my attorneys that on August 5, 1992, the Court of Appeals for the Fifth Circuit vacated an injunction against a Mississippi law that requires criminal penalties if I perform an abortion on a woman less than 24 hours after I provide certain biased and misleading information. Shortly thereafter, my attorneys informed me that the Mississippi Attorney General's office had indicated that the law would be enforced beginning Saturday, August 8 at midnight. Consequently, this law has been in effect for more than three weeks and its impact has been devastating.

9. Although my patient load is ordinarily somewhat lower in the month of August, in all my years of clinical experience I have never seen such a sudden and dramatic drop in the number of patients seeking abortions all at once in every location.

10. In particular, since this law went into effect, I have provided abortions to an average of 25-30 patients at the Southaven clinic and an average of 20-25 patients at the Jackson clinic. This is more than a 50% drop in patients obtaining abortions since the law went into effect.

11. I talk directly to my patients to provide informed consent. From my past experience with the life circumstances of the women for whom I provide abortions, combined with the experience of myself and my staff since the law has gone into effect, there is no question in my mind that the drop in patients is largely due to the law.

12. Patients have said that they are unable to get two days off from work and that they are unable to explain to their families why they will be away for two days in a row.

13. The increased expense, time, and travel is crushing for many of my patients.

14. An additional problem is the increased exposure to harassment by anti-abortion groups due to the 24 hour waiting period and its necessary consequence of two visits to my office. In fact, last week in Southaven, I saw two men in a car driving through the parking lot outside the clinic. They were copying down license plate numbers.

15. In sum, the law has already proven to be far more than an inconvenience for my patients and it certainly does nothing to promote real informed consent. It acts as a total bar for many women. With each passing week, more and more of Mississippi's pregnant women are affected. The effects are irreparable. Unwanted pregnancy and parenthood leave permanent scars.

WHEREFORE I request that plaintiffs-appellees' motion for injunction pending review on certiorari be granted.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Aug 28, 1992 /s/
Thomas W. Tucker, II, M.D.

DECLARATION OF NANCY C. ROGERS

Nancy C. Rogers deposes and states the following:

1. I am the administrator of New Woman Medical Center, Inc. (hereinafter referred to as "New Woman") in Jackson, Mississippi. I have been administrator of New Woman since 1986 and have been employed by New Woman since 1980. New Woman is one of the plaintiffs-appellees in the above-referenced case. New Woman is one of only three providers of abortion services located in the entire State of Mississippi.

2. As the administrator of New Woman, I am in a position to be familiar with the care provided to patients and events that take place around the facility. I have personal knowledge of all of the matters addressed in this declaration. I submit this declaration in support of the motion of plaintiffs-appellees for an injunction pending review on certiorari.

3. Since at least 1986, protestors who are opposed to abortion have demonstrated at New Woman and taken action designed to prevent women from obtaining abortions. The protestors' actions have included harassment of patients and staff. The protesters have also threatened and caused damage to the clinic itself.

4. Some of the specific actions taken by the protestors include the following:

a. Several of the protestors have jars that contain fetuses that appear to be from late stages of pregnancy. The protestors push the jars into the sight of patients entering the clinic and represent that the fetus is from a first trimester abortion. The protestors have also made similar misrepresentations with photographs of fetuses from late pregnancies.

b. The protectors regularly call the patients and staff by insulting and demeaning names. For example, patients are often referred to as "murders" and staff are called "butchers" and "jezebels."

c. The protestors have made many attempts to identify patients at the clinic so that they can notify the patient's family and neighbors that the patient has had or is considering an abortion. The protestors identify patients, or at least attempt to make the patient believe that they do so, by taking license tag numbers from vehicles. The protestors also take photographs of patients as they enter and leave the clinics.

d. The protestors have followed me and other staff members to our homes. One group of protestors wrote a letter to my neighbors, telling them that a murderer lived in their neighborhood. They also staged several demonstrations around my home, in one instance holding a "prayer vigil" in my front yard.

e. The protestors, or anonymous callers who are assumed to be protestors, have caused the clinic to be closed on several occasions by making threats of physical harm, including bomb threats.

5. Since August 5, 1992, Mississippi has enforced its law requiring that patients seeking abortions obtain prescribed counseling and wait twenty-four hours from the time that counseling is given before they obtain an abortion. As a result of this law, each of our patients must make two trips to the clinic, one for counseling and a second visit at least twenty-four hours later for the procedure.

6. Immediately following the Court's order vacating the injunction against the waiting period law, Roy McMillan, who is the leader of the State's primary anti-choice group, announced that he and other protestors would utilize the twenty-four hour period to become more "confrontational" in their efforts to disuade and block women from terminating their pregnancies.

McMillan further stated that the requirement that patients make two trips to the clinic and wait twenty-four hours before the procedure can be performed gives him and other anti-abortion activists the opportunity to contact the patients, their friends and family. He stated that the protesters would obtain names and addresses of patients from automobile license tags in the parking lot of the clinics and then contact their neighbors, ministers and families to persuade them to decide against having the procedure.

7. McMillan made these statements to the press and they were reported in the Clarion Ledger newspaper and copies of the relevant stories are attached hereto as Exhibit "A". The Clarion Ledger has the largest circulation of any newspaper in the State of Mississippi. While I had seen this activity before the law went into effect, the law gives these individuals the time they need to use - or misuse - this private information.

7. Since the law requiring a waiting period went into effect, I have observed persons in the parking lot of the clinic copying automobile license tag numbers. I have further been advised that protesters have been seen copying automobile license tag numbers at the only other two abortion facilities in the State of Mississippi.

8. Since the law requiring a waiting period went into effect, the number of patients seen by New Woman has decreased by approximately fifty percent (50%). I believe that the reduction in patients is caused by women's concerns the their private and confidential decision to obtain an abortion will be made public by the protesters.

9. The reduction in patients is almost certainly caused, as well, by the extra financial and travel burdens this law imposes on our patients, many of whom travel four hours to get to the clinic and have saved money for weeks to afford the one trip and procedure.

10. I fear that this law is already leading Mississippi women to bear children they do not want and cannot afford. It increases

exponentially the impact of poverty, travel and fear of exposure through the actions of opponents of abortion.

WHEREFORE plaintiffs-appellees' motion for a stay of the mandate and injunction pending certiorari should be granted.

I declare under penalty of perjury that the foregoing is true and correct.

Date: August 31, 1992

/s/
Nancy C. Rogers

THE CLARION-LEDGER
Tuesday, August 11, 1992

Abortion rule angers women

Law's 24-hour wait is problem, clinicians say
By J. Lee Howard
Clarion-Ledger Staff Writer

Dozens of angry women called a Jackson abortion clinic Monday to complain about having to wait 24 hours to terminate their pregnancies.

But Lisa Brown, administrator at Mississippi Women's Medical Clinic, said she offered the callers little sympathy.

"It has been total chaos," Brown said. "The patients are going wild, and they're blaming it on us."

Monday was the first business day that Mississippi's informed-consent abortion law was in effect.

The law requires a 24-hour waiting period and mandates that physicians inform women of options other than abortion.

The 5th U.S. Circuit Court of Appeals in New Orleans ruled Wednesday that Mississippi's law is constitutional. The law was patterned after a Pennsylvania statute that also requires a 24-hour waiting period. In June, the Pennsylvania law was upheld by the U.S. Supreme Court. Mississippi's law went into effect at midnight Saturday.

Brown said the clinic at 3542 Terry Road received at least 70 calls from women statewide who are furious at having to wait 24-hours.

"They're mad as hell," Brown said. Mississippi Women's Clinic attempted to block the law and spent thousands to fight it in court, Brown said.

"I tell them, 'Why are you getting on my case? You didn't do anything but sit on your duff,'" Brown said. "If women in Mississippi do not wake up and smell the coffee, then they're going to lose even more of their rights. In five years, they're not going to be able to vote."

Administrators and physicians at the state's other two clinics, New Woman Medical Center, 614 Briarwood Drive in

Jackson, and Tri-State Women's Clinic in Southhaven, could not be reached for comment Monday.

Parking lots where deserted Monday and no anti-abortion protesters were in evidence in Jackson. Brown said Mississippi Women's and other clinics in the state typically do not perform abortions on Mondays. Most abortions are performed Wednesdays, Fridays and Saturdays.

Brown said she anticipates anti-abortion protestors such as the Jackson-based Christian Action Group will be back later in the week, harassing patients and staff.

"It never gets printed what the doctors and patients and nurses go through every day just to get into the clinic," Brown said.

Roy McMillan, head of the Christian Action Group, said its members probably will picket on Wednesday, Friday and Saturday.

"The reason we weren't there (Monday) is because the abortionists weren't there," McMillan said. "We're there when the children in the womb are in the greatest danger."

The success of the informed-consent law doesn't mean the anti-abortion fight is won, McMillan said.

McMillan said he and members of the group will be taking down license plate numbers in hopes of tracking down the women and their relatives, even if it means contacting their neighbors and pastors. If the women can be found, then the Christian Action Group hopes to convince them not to have an abortion.

"It will definitely work to our advantage," McMillan said. "This will give us another 24 hours.

"A lot of people may think this is an invasion of privacy," he said. "But if they're killing a child, it seems appropriate. You kind of need to go to radical steps."

Virginia Stallworth, president of the Mississippi Chapter of the National Organization For Women, said McMillan's methods anger her.

"It's hard to put into words how angry that makes me," Stallworth said. "We are aware that what the 'anti's' are trying to do is extend the period of time for an abortion." The informed-consent law will be another weapon for groups who

wish to battle a woman's legal right to abortion, she said.

"This (law) is not there to protect patients," Stallworth said. "It's just another vehicle to harass patients. Abortion is still the law of the land, and we are talking about a major violation of a person's right to privacy."

THE CLARION-LEDGER
Friday, August 7, 1992

Anti-abortion activist 'to be more confrontational'

By Beverly Pettigrew Kraft
Clarion-Ledger Staff Writer

Anti-abortion activist Roy McMillan said Thursday that a 24-hour waiting period for abortion will give him more time to try to talk women out of getting abortions.

"It will definitely give us an opportunity to be more confrontational," said McMillan of Jackson, executive director of Christian Action Group and an Operation Rescue leader.

McMillan said he an other anti-abortion activists write down license tags, trace addresses and try to talk to women at home. They call parents, husbands, boyfriends and ministers.

"If you know where and when someone is about to die, as a Christian you have the moral responsibility to intervene," McMillan said. "We will do anything legal and illegal in order to stop the killing, short of violence."

McMillan has been arrested 53 times outside clinics. He faces a court appearance today in Southhaven on a disorderly conduct charge for attempting to block the driveway of a Southhaven abortion clinic Saturday.

McMillan sat in jail until Wednesday. He said he refused to post a $37 bail bond.

Betty Hammond of Senatobia, chairman of the Pro-Life Committee of the American Family Association of Northwest Mississippi and among the more than 30 arrested Saturday in Senatobia, praised the informed consent law.

"We believe that if they are more informed, many times they will change their minds . . . . They are upset and they don't know what to do."

Dierdre Janney, executive director of the Mississippi American Civil Liberties Union, said violating someone's privacy is "an abomination and a direct violation of the Constitution."

Nancy Rogers, administrator at New Woman Medical Center at 614 Briarwood Drive in Jackson, said, "These people stand

outside in front of the clinics with video cameras. They already take down tag numbers. That's not anything new.

"I think (McMillan) ought to come back within the law. We are operating within the law."

Supreme Court, U.S.
FILED
NOV 17 1992
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No. 92-588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HELEN B. BARNES, M.D.; JOSEPH MITCHELL, M.D.; JOSEPH BOOKER, M.D., on behalf of themselves, their patients, and all others similarly situated; NEW WOMAN MEDICAL CENTER, INC.; and MISSISSIPPI WOMEN'S MEDICAL CENTER,

Petitioners,

v.

MIKE MOORE, as Attorney General of the State of Mississippi, and his employees, agents and successors,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1992

No. 92-588

HELEN B. BARNES, M.D.; JOSEPH MITCHELL, M.D.; JOSEPH BOOKER, M.D., on behalf of themselves, their patients, and all others similarly situated; NEW WOMAN MEDICAL CENTER, INC.; and MISSISSIPPI WOMEN'S MEDICAL CENTER,

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent Mike Moore, Attorney General of the State of Mississippi, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit. That opinion is reported at 970 F.2d 12 (5th Cir. 1992).

STATUTES INVOLVED

The text of the Mississippi Informed Consent to Abortion Act, Miss. Code Ann. § 41-41-31, *et seq.* (Supp.), is contained in the Appendix to the Petition, 15a-19a. The

Act does not prohibit abortions. Instead, as observed by the Court of Appeals, the Act is substantially identical to that of Pennsylvania approved in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, —— U.S. ——, 120 L.Ed.2d 674 (1992). Where in a physician's best clinical judgment a medical emergency exists so that an immediate abortion is necesary, the requirements of the Act are waived.

Briefly, Section (a) of § 41-41-33 requires that certain information of a medical nature be disclosed by the physician. A referring physician rather than the abortion provider may give this information. Subsection 2(a)(ii) requires the physician to disclose particular medical risks of abortion "when medically accurate" including the "risks of infection, hemorrhage, danger to subsequent pregnancies and infertility." Under the statute, only "medically accurate" information is required to be disclosed. Except for the fact that the physician must give medically accurate information as to the risk—or non-risk as the case may be—for infection, hemorrhage, and potential future pregnancy complications (all of which are documented possible medical complications), the physician under the Act is free to exercise his professional judgment to inform the woman of the particular risks to her of the procedure, and to give whatever individualized medical information may be appropriate. Subsection 2(a)(iii) requires the physician to inform the patient of the gestational age of the fetus. Subsection 2(a)(iv) requires that the woman patient be advised by the physician of the "medical risks associated with carrying her child to term," that is, of the medical alternative to abortion, which is normal childbirth. These provisions are virtually identical to that of Pennsylvania, *see Casey*, 120 L.Ed.2d at 731-732 (Appendix to Opinion).

Section 2(b) ensures that a pregnant woman is at least aware of a possibility of assistance during pregnancy and after childbirth. To meet the minimum floor of disclosure required by the Act, only a scintilla of informa-

tion is mandated. Subsection 2(b)(i) provides that the patient be informed "that medical assistance benefits may be available for prenatal care, childbirth, and neonatal care." Subsection 2(b)(ii) requires only that the woman be informed "that the father is liable to assist in the support of her child. . . ." Section 2(b)(iii) requires that the woman be advised that there are available private and public services for pregnancy prevention. A physician's agent, rather than the physician, may provide this information. These requirements are materially indistinguishable from that of Pennsylvania, *see Casey, supra.*

Sections 2(b)(iv) and 3 ensure that the woman has an opportunity, if she so desires, to review objective materials describing fetal development and a list of agencies providing relevant alternative services. The Act requires that a woman be informed by the physician's agent of her opportunity to review printed materials provided by the State and which describe the stages of fetal development and list agencies that offer alternatives to abortion. Section 3 of the Act describes the printed materials to be made available, which are to be "objective, nonjudgmental, and designed to convey only accurate information." These provisions are similar to Pennsylvania's statute, *see* 120 L.Ed.2d at 734.

Like Pennsylvania's Act, Mississippi's statute requires a 24-hour waiting period between the time of disclosure of information and the performance of the abortion, except in cases of medical emergency. No disclosure or waiting period is required where in a physician's best clinical judgment a "medical emergency" exists. The medical emergency definition is virtually identical to that of Pennsylvania approved in *Casey* and serves the same function. 970 F.2d at 14-15.

REASONS WHY THE PETITION SHOULD BE DENIED

I. MISSISSIPPI'S INFORMED CONSENT ACT IS SUBSTANTIALLY IDENTICAL TO THAT APPROVED IN *CASEY*, AND THE CORRECT RESULT WAS REACHED BY THE COURT OF APPEALS.

In this Court's judgment last term in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, —— U.S. ——, 120 L.Ed.2d 674 (1992), seven Members of the Court agreed that the informed consent/24-hour waiting period provision of Pennsylvania's Abortion Control Act, with its medical emergency exception, was constitutional on its face, 120 L.Ed.2d at 716-721 (Joint Opinion); *id.* at 758, 773-775 (opinion of Rehnquist, C.J., concurring in the judgment in part and dissenting in part). As stated by the Fifth Circuit Court of Appeals in the instant case, and as Respondent has pointed out in the foregoing section, the provisions of Mississippi's Informed Consent to Abortion statute, Miss. Code Ann. § 41-41-31, *et seq.* (Supp.), are "substantially identical" to the relevant part of Pennsylvania's statute held constitutional on its face in *Casey*. 2a; 970 F.2d at 13.[1] There is no material distinction between the statutes.

In the context of the facial challenge here, this salient and controlling point—barely acknowledged in the abortion providers' petition in this Court—was dispositive as a matter of law. Since Mississippi's informed consent/waiting period statute is virtually identical in every material respect to that of Pennsylvania, the result reached in the Court of Appeals in this narrow circumstance was not only correct but was mandated under the principle

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[1] As the Court of Appeals further pointed out, Mississippi's informed consent/24-hour waiting period statute does not include several types of provisions included in Pennsylvania's Abortion Control Act reviewed in *Casey*. Mississippi's statute does not contain, for example, the spousal notification, recordkeeping, and informed parental consent features of Pennsylvania's abortion act. 2a; 970 F.2d at 13.

that lower federal courts must adhere to the holdings of the Supreme Court. As the Court of Appeals implicitly recognized, where the issue is *facial* constitutionality, there can be no principled basis to hold that specific statutory provisions deemed constitutional on their face in one State could somehow become invalid on their face as an identical measure in a Sister State.[2] In view of the fact that Mississippi's informed consent/24-hour waiting period/medical emergency statute is virtually identical to that of Pennsylvania, the result reached by the Court of Appeals—to uphold the constitutionality of the statute on its face as a matter of law—was the only possible outcome, and there is accordingly no good reason for this Court to further review that correct result.

II. THE NARROWLY-DRAWN OPINION OF THE COURT OF APPEALS IS NOT AN APPROPRIATE VEHICLE BY WHICH TO REVIEW THE BROAD QUESTION PRESENTED IN THE PETITION.

Because Mississippi's informed consent/24-hour waiting period statute is essentially identical to that approved on its face by seven Members of the Court in *Casey*, and because this was a facial challenge, the question presented by the Petitioners in generic fashion does not accurately reflect the narrow and particularized context in which the Court of Appeals ruled. The broad Question proposed by Petitioners here—whether some generic "statute" must be put to some "evidentiary" hearing to determine in open-ended fashion if some undefined "undue burden" exists, without any apparent reference to the opinions of this Court and its Members (Pet. i)—was not decided

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[2] Such an approach to questions of the facial constitutionality of State abortion regulations, if authorized, would not only dismay and confuse the public but would also confound State legislators of the various states who rely upon the decisions of this Court in determining what measures are, and are not, permissible in this area.

and was not addressed by the Court of Appeals. Instead, the Court of Appeals prudently confined its holding of constitutionality to the particular circumstances before it: a facial attack upon a statutory provision identical to that which had been approved as constitutional on its face by this Court in *Casey*. 3a, 6a,-7a; 970 F.2d at 14-15. Having ruled on narrow and easily sustainable grounds, the Court of Appeals' judgment is accordingly not an appropriate springboard to review of the broad proposition sought to be launched by petitioners here.[3]

Moreover, Respondent further submits that the traditional criteria which might warrant the exercise of the Court's certiorari jurisdiction do not exist here. There is no conflict among the Circuit Court of Appeals regarding the subject matter of the Fifth Circuit's decision in the instant case, nor do the Petitioners claim any current conflict with the highest court of a State or among other lower federal courts. Indeed, the complete absence of any cited conflict whatsoever is not surprising in light of the fact that Petitioners essentially demand the Court to revisit, and to reinvent, its judgment just four months ago in *Casey* with regard to the facial constitutionality of a substantially identical informed consent/waiting period statute. Thus, even assuming in the abstract that the Petitioners have presented a viable issue—a point not conceded in any manner by Respondent—no conflict among the Circuits or disagreement of other courts with the Fifth Circuit has had time to mature. In the absence of any conflict in the lower courts, review in this Court of the Fifth Circuit judgment would be premature.

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[3] Indeed, if review were granted, this Court would ordinarily seek to rule on the narrowest grounds available and to avoid if possible any unduly broad proposition of constitutional law. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-347, 80 L.Ed. 688 (1936) (Opinion of Brandeis, J.).

III. THE PETITION SETS FORTH NO GOOD REASONS TO GRANT REVIEW.

No good reasons for the Court to grant a writ of certiorari in this case have been presented in the petition. As observed by the Fifth Circuit, the Petitioners at oral argument before that court "essentially conceded" that they were unlikely to succeed on the merits of their facial challenge in view of the recent decision of this Court in *Casey*. App. 2a; 970 F.2d at 13. The abortion providers nevertheless claim here that the Court should review the Fifth Circuit judgment holding Mississippi's informed consent statute constitutional as a matter of law because, in their view, the Joint Opinion of Justices O'Connor, Kennedy, and Souter (1) mandates some type of full evidentiary hearing as to every non-prohibitory abortion regulation to determine anew whether some generic and undefined undue burden exists (regardless of the fact that seven Members of the Court might have approved an identical measure), Pet. at 7-20; and (2) the Joint Opinion implicitly overrules the standard utilized to determine the *facial* constitutionality of an abortion regulation. Pet. at 21-25. At least with regard to informed consent/24-hour waiting period abortion regulations, however, the longstanding individual views of various Justices have now converged to form a consensus at least as to the validity of these specific measures.[4]

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[4] *See Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452, 472-474, 76 L.Ed.2d 678 (1983) ("Akron I") (O'Connor, J., dissenting, joined by White and Rehnquist, JJ.) (24-hour waiting period with a medical emergency exception is not an undue burden on any abortion right); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 785, 798-804 (1986) (White, J., dissenting, joined by Rehnquist, J.); *id.* at 782-785 (Burger, C.J., dissenting); *id.* at 814, 829-831 (O'Connor, J., dissenting); *Casey*, 120 L.Ed.2d at 716-721 (Joint Opinion of Justices O'Connor, Kennedy, and Souter); *id.* at 773-775 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part). While there was disagreement among the seven Members of the relevant majority in *Casey* as to

First, Respondent respectfully submits that the abortion litigators' nirvana envisioned by Petitioners—an evidentiary hearing with a case-by-case "factual" analysis and relitigation of every abortion regulation—is nowhere required by the specific text of the Joint Opinion that is operative as to the statute here, fairly read. *See* 120 L.Ed.2d at 718-719. The Petitioners' essential premise for their position that those statutes determined to be facially constitutional in *Casey* may be relitigated in each State is that the *Casey* holding "was based on a limited factual record developed under the strict scrutiny standard of review." Pet. at 8. That premise of Petitioners is fictional in nature.[5] To be sure, the district court record is mentioned in the Joint Opinion with re-

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the precise standard of review which should be applied, there was no such disagreement as to the basic result which should obtain regarding the type of measure at issue here.

[5] The suggestion that there was a "limited factual record" in the lower court in *Casey* is indeed a bit of revisionist history now launched by the same professional abortion litigation firm that tried *Casey* in the district court and argued it before this Court. Because the implications of *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), were apparent to both sides in the district court in *Casey*, a full record as to the purported "burdens" of the 24-hour waiting period was made, and the district court's overall findings and conclusions in the case encompassed some 75 pages. 744 F. Supp. 1323 (E.D. Pa. 1990). The district court's lengthy findings on the waiting period in *Casey* could not have been more adverse to the State of Pennsylvania; *see* 744 F. Supp. at 1351-1352. The Plaintiffs' proof and conclusions were accepted in every respect by the district court in *Casey*. The district court made 14 specific findings of fact based on the trial testimony concerning the significant burden and risks a 24-hour waiting period would impose, Findings 190-203, 744 F. Supp. at 1351-1352. Based on those adverse findings, the district court further concluded that a 24-hour waiting period imposed a "legally significant burden" on Pennsylvania women, that "many women must travel substantial distances to reach the nearest abortion provider," that a woman's travel and exposure to demonstrators would be doubled, the costs "significantly increase[d]," and the impact felt greatest by Pennsylvania's poor and rural women. 744 F. Supp. at 1378-1379 & n.34. This Court nevertheless upheld the statute on its face.

gard to the 24-hour waiting period (as is the operative point that the challenge is a "facial" one, 120 L.Ed.2d at 721). Respondent submits, however, that the net effect of that reference, in light of the extensive adverse factual findings made by the *Casey* district court, is to confirm that a short 24-hour waiting period after disclosure is not an "undue burden" and is valid on its face as a matter of constitutional law where a medical emergency exception is provided.[6]

As the Court of Appeals recognized, there is no inherent or absolute right to an evidentiary hearing, in abortion litigation or elsewhere, where the defined legal standard plainly dictates the outcome as a matter of law. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265 (1986). Put simply, neither the creative zeal of these abortion providers not their purported "evidence" belatedly submitted to the Fifth Circuit in affidavits and newspaper articles, *see* Pet. at 8-9, 22a-40a, after the merits of the appeal had been decided,[7] can change the result or warrant a remand in the context of the particular facial challenge here. These purported "facts" are not materially different from those proffered in *Casey*.[8]

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[6] *See Casey*, 120 L.Ed.2d at 720-721: "Although [the district court's] findings are troubling in some respects . . . they do *not* demonstrate that the waiting period constitutes an undue burden." (emphasis supplied).

[7] The Petitioners did not seek a rehearing on the merits before the Fifth Circuit after the appeal was decided. Instead, they chose the extraordinary route of filing before the Court of Appeals a motion for a stay of the mandate and for an injunction pending their filing of a certiorari petition to this Court.

[8] Respondent questions the factual accuracy or the admissibility of substantial portions of these materials. An abortion provider claims, for example, that the number of abortions he performed dropped in the two weeks after Mississippi's statute was permitted to go into effect by the Court of Appeals. 30a. While Respondent has no way of verifying the truth of this claim, the

The Petitioners further suggest that the Fifth Circuit also erred by relying on the test for the facial invalidity of a statute set forth in such cases as *United States v. Salerno*, 481 U.S. 739, 745, 95 L.Ed.2d 697 (1987).[9] Pet. at 21. They essentially contend that the Joint Opinion in *Casey* overruled the *Salerno* standard.

The Joint Opinion in *Casey* does not purport to overrule *Salerno*, nor any of the abortion cases which have expressly and properly followed that test, *see Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (O'Connor, J., concurring); *Ohio v. Akron Center for Reproductive Health*, —— U.S. ——, 111 L.Ed.2d 405, 420 (1990) ("Akron II") (Kennedy, J.). At least insofar as the informed consent/waiting period measures are concerned, which are the only type of provisions at issue in this case, the disposition in *Casey* is consistent with the *Salerno-Akron II* test.[10] The Court of Appeals was correct in its determination that *Salerno* and *Akron II* had not been overruled *sub silentio*.

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fact of the matter is that there is no requirement that a state which is seeking to ensure informed choice act in a manner so as to "maximize the number of abortions," *see Thronburgh*, 476 U.S. 747, 801 (1986) (White, J., dissenting), nor that a state's legitimate statutes be "fine tuned" so as to enhance or promote abortion, *see H. L. v. Matheson*, 450 U.S. 398, 413, 67 L.Ed.2d 388 (1981).

[9] Under that standard, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno, supra.*

[10] Indeed, it appears the Joint Opinion implicitly utilized the facial invalidity test where the measure reviewed was deemed to reasonably enhance the opportunity for informed choice. With regard to the waiting period, for example, the Joint Opinion specifically rejected the contention that the "'particularly burdensome' effects of the waiting period on *some women* require its invalidation," 120 L.Ed.2d at 721 (emphasis supplied). This is squarely consistent with one of the distinguishing features of the facial invalidity test, that is, that a "worst case" scenario as to some does

IV. THE POSITION ADVANCED BY PETITIONERS, IF ACCEPTED, WOULD ENGENDER CONFUSION AND UNCERTAINTY IN THIS AREA OF THE LAW.

In addition, Respondent submits that the practical effect of Petitioners' position, if accepted in this case, would be further confusion and uncertainty in this area, accompanied by continuous litigation and relitigation of the facial constitutionality of identical laws in different States. Under the Petitioners' version of abortion litigation nirvana, each of the fifty States could determine that a short 24-hour waiting period measure was appropriate—a provision that seven Justices of this Court have agreed is a legitimate and reasonable adjunct to informed choice—and yet each of the fifty would be required to litigate various and sundry demographic "facts" on some type of *ad hoc* basis before the *facial* constitutionality of the identical statutes could be established.

The Petitioners' agenda would surely turn the federal district courts into nothing more than a second, "super," legislature. In the context of a facial challenge, Petitioners' version of constitutional adjudication is a notion that runs contrary to the rule that federal district courts do not sit to redetermine "legislative" facts (as opposed to "adjudicative" facts), *Vance v. Bradley*, 440 U.S. 93, 112, 59 L.Ed.2d 171 (1979).

Moreover, if, as Petitioners suggest, the facial validity of a 24-hour waiting period must vary from State to State based on such matters as the particular geographical dimensions of a State, the particular demographics of a State, or the particular (and always changing) commercial abortion market characteristics of a State or political subdivision, then how is a federal district judge to distinguish or to assess such arcane "facts?" By the number of abortion clinics per square mile, or some other con-

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not suffice to strike down a statute on its face. *See Akron Center II*, 111 L.Ed.2d at 420.

trived statistic? In such circumstances, conflicting results are inevitable. Respondent respectfully submits that Petitioners' position cannot be the rule. Just as the condition of indigency cannot be considered to be a state-imposed barrier to abortion, *see Harris v. McRae*, 448 U.S. 297, 316 (1980), neither the private, voluntary business decisions of abortion providers as to where they decide to commercially locate or relocate, nor the essentially private circumstance of where people happen to live in relation to those commercial abortion providers, is the product of state action.

Finally, and for similar reasons, the *ad hoc* test proposed by Petitioners would create confusion for State legislators who seek to model legislation to conform with the holdings of this Court as to the constitutionality of specific abortion regulations. Uncertainty would be engendered, and the facial constitutionality of any particular legislative measure could never be predicted with confidence.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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Dated: November 17, 1992

No. 92-588

Supreme Court, U.S.
FILED
NOV 23 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HELEN B. BARNES, M.D.; JOSEPH MITCHELL, M.D.; JOSEPH BOOKER, M.D., on behalf of themselves, their patients, and all others similarly situated; NEW WOMAN MEDICAL CENTER, INC.; and MISSISSIPPI WOMEN'S MEDICAL CENTER,

Petitioners,

—v.—

MIKE MOORE, as Attorney General of the State of Mississippi, and his employees, agents and successors,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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No. 92-588

IN THE
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OCTOBER TERM, 1992

HELEN B. BARNES, M.D., JOSEPH MITCHELL, M.D., JOSEPH BOOKER, M.D., on behalf of themselves, their patients, and all others similarly situated; NEW WOMAN MEDICAL CENTER, INC.; MISSISSIPPI WOMEN'S MEDICAL CLINIC,

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MIKE MOORE, as Attorney General of the State of Mississippi and his employees, agents and successors,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent's opposition to certiorari in this case is based on three arguments. First, Respondent contends that the Fifth Circuit judgement in this case was "mandated" because the Mississippi statute challenged here is "'substantially identical'" to the relevant part of Pennsylvania's statute held constitutional on its face in *Casey*." Respondent's Brief in Opposition to Certiorari at

4-5 (citation omitted).[1] Second, Respondent contends that "no conflict among the Circuits or disagreement of other courts with the Fifth Circuit has had time to mature." R. Opp. at 6. Third, Respondent contends that a constitutional standard for reviewing restrictive abortion laws that depends on an individual factual assessment in each case will engender "confusion and uncertainty." R. Opp. at 11. Petitioners reply to these arguments in so far as they raise matters not previously addressed in their Petition.

Respondent's first argument assumes that there is "no material distinction," R. Opp. at 4, between the language, purpose, and effect of the Mississippi law at issue here and the Pennsylvania law at issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2719 (1992).[2] As the court of appeals acknowledged, however, even the text of the two laws is different. 4a - 6a.[3] Moreover, because Petitioners sought to prove their case under the standards of *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, there was no evidentiary record before the courts below on the "purpose" of the Mississippi law and

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[1] Citations to Respondent's Brief in Opposition to Certiorari will hereinafter be to "R. Opp. at __."

[2] After *Casey*, the constitutionality of a law restricting abortion is based on whether the law in question "has the *purpose* or *effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 112 S. Ct. at 2820 (emphasis added).

[3] Petitioners briefed the nature of these textual differences and their significance in the health care context at some length in the court below. *See* Supplemental Brief of Plaintiffs-Appellees in *Barnes v. Moore*, No 91-1953 at 9-18 (5th Cir. filed July 22, 1992). The court of appeals made no attempt to analyze these differences seriously or to assess the constitutional significance of Mississippi's more restrictive requirements.

no evidence on whether the "effect" of the law would be to impose a "substantial obstacle" on the choices of Mississippi women.[4] There is, thus, a total absence of any foundation for a conclusion that the Mississippi law is identical to that at issue in *Casey* in those respects that are material to the constitutional analysis.

As to Respondent's argument that there is no conflict among circuit courts, there is now an emerging divergence of opinion in the courts of appeals regarding the correct application of the "undue burden" test, at least as to pending cases in the lower courts. *See* Supplemental Brief in Support of Petition for a Writ of Certiorari (filed herewith).[5] It is critical that this Court clarify whether

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[4] The "truncated" hearing that did occur in the district court, 14a, focused almost entirely on the health consequences of the statute's strict medical emergency requirement, regarding which there was then no constitutional precedent from this Court. However, as described in the Petition for a Writ of Certiorari at 9 (hereinafter "Pet. at ___"), and substantiated by declarations reprinted and appended thereto, *see* 22a - 28a, the burdens imposed on Mississippi women by the state's 24 hour waiting period will be exceptionally severe. Indeed, these burdens already appear to have effectively precluded abortion for some women. 29a - 40a. These declarations should be considered as a preliminary offer of proof regarding evidence to be submitted on remand and the facts they set forth should be viewed as true for purposes of this Court's review of the pre-trial dismissal of this case by the court of appeals. Whether or not these facts are accurate or admissible, *see* R. Opp at 9 n. 8, and whether or not they establish an "undue burden," simply cannot be conclusively decided by a Supreme Court decision in a *different* case regarding a *different* statute from a *different* state on a record that itself attempted only to meet the no-longer-applicable standard of strict scrutiny under *Roe*, 410 U.S. 113, and the cases that followed.

[5] Indeed, the decision of the Third Circuit on remand in *Casey* is contrary to the argument of Respondent that the constitutionality of the (continued...)

plaintiffs challenging restrictive abortion laws -- including laws with varying degrees of similarity to the law at issue in *Casey* -- are entitled to an opportunity to meet their newly heightened burden of proving that a law is unduly burdensome. Without an individual assessment by a trial court of the sufficiency of the existing record, a decision of this Court that lets stand the Fifth Circuit's conclusory assertion that "[f]urther evidentiary proceedings would not affect . . ." the constitutionality of the Mississippi law, 7a, threatens to eviscerate the protection offered to Petitioners by *Casey*'s undue burden standard. Where courts of appeal differ on a matter of such importance, review by this Court is essential.

Finally, Respondent argues that uncertainty and confusion will result if *Casey* requires a factual assessment of the burdens imposed by a law in every case. Nearly every member of this Court has recognized that case-by-case factual determination of the substantiality and nature of any obstacle to the abortion choice intended by a legislature and imposed by a law is the necessary consequence of the shift from the strict scrutiny of *Roe* to the undue burden analysis of *Casey*. *See* Pet. at 13-16. It is also the necessary consequence of permitting those who assert violations of constitutional rights under this standard to have their day in court. If confusion will indeed be the consequence, as Respondent contends, then review of this case and clarification by this Court is even more critical.

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[5] (...continued)
Pennsylvania law was conclusively determined by the decision of this Court in that case. *See* Appendix to Supplemental Brief.

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Dated: November 23, 1992

No. 92-588

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HELEN B. BARNES, M.D.; JOSEPH MITCHELL, M.D.; JOSEPH BOOKER, M.D., on behalf of themselves, their patients, and all others similarly situated; NEW WOMAN MEDICAL CENTER, INC.; and MISSISSIPPI WOMEN'S MEDICAL CENTER,

Petitioners,

—v.—

MIKE MOORE, as Attorney General of the State of Mississippi, and his employees, agents and successors,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioners,

-v.-

MIKE MOORE, as Attorney General of the State of Mississippi and his employees, agents and successors,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This supplemental brief is submitted in support of the Petition for a Writ of Certiorari previously filed with this Court. It seeks to update the Court on new developments, including a recent decision of the Court of Appeals for the Third Circuit that differs from that of the Fifth Circuit in its interpretation of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992).

In *Casey*, a plurality of this Court articulated a new standard for assessing the constitutionality of a statute

restricting abortion. *Id.* at 2821. This standard requires courts to determine whether such a statute "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 2820. Reviewing the opinion of the lower court in *Casey*, this Court then "affirmed in part . . . [,] reversed in part and . . . remanded for proceedings consistent with . . . [its] opinion, including consideration of the question of severability." *Id.* at 2833.

Nearly one month after the Petition for a Writ of Certiorari was filed in this case, the Court of Appeals for the Third Circuit issued its decision on remand. *See Casey*, No. 90-1662 (3rd Cir. October 30, 1992).[1] The Third Circuit held that the Pennsylvania statutory provisions invalidated by this Court in *Casey* were severable under applicable legal standards. 11sa. In briefing the severability issue, however, plaintiffs in *Casey* stated their intention to ask the district court to reopen the record for "further factual findings related to . . . the 'new undue burden analysis.'" 11sa. In response, defendants asked for additional briefing, arguing that this Court's decision in *Casey* was a "final judgement" and that a remand permitting the record to be reopened would be "flatly inconsistent" with this judgement. *See* Appellants' Surreply Brief on Severability at 1 in *Casey*, No. 90-1662 (submitted September 15, 1992, but never filed).[2] Observing that the

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[1] The Third Circuit's decision on remand in *Casey* is reprinted and attached as a supplemental appendix. Citations to the Third Circuit decision will be to "__sa". Citations to the decision of the Court of Appeals for the Fifth Circuit will be to the appendix to the Petition for a Writ of Certiorari as "__a".

[2] The proposed surreply was filed with a Motion to Permit Surreply (continued...)

question of whether the record in *Casey* may be reopened was "not a matter for our court, at least at this time[,]" 11sa, the Third Circuit denied the request for additional briefing, amended its judgement and "remanded for such further proceedings as may be appropriate." *Id.*

The Third Circuit's mandate stands in contrast to that issued by the Fifth Circuit below. Concluding that this Court's decision in *Casey* rendered the Mississippi statute at issue here constitutional as a matter of law, 7a, the Fifth Circuit in the instant case barred any and all further proceedings by remanding to the district court only "for entry of an order of dismissal." *Id.* Indeed, after a Motion for Stay of Mandate and Injunction Pending Review of Petition for Writ of Certiorari was denied by the court of appeals, 12sa, the district court had no choice but to dismiss this case, *see* 13sa,[3] although the factual record had been "truncated," 14a, no factual findings had been made, *see generally* 8a-14a, and no analysis under an "undue burden" standard had been entertained, *see* 12a.

A comparison of the mandates of these two courts of appeals reveals divergent understandings of the constitutional analysis employed by this Court in *Casey*. In plain terms, the Fifth and Third Circuits appear to differ on the question of whether litigants mounting a facial

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[2] (...continued)
Brief on Severability (filed September 15, 1992), which Motion was denied by the Third Circuit in an Order dated October 30, 1992. 14sa.

[3] Noting that the Fifth Circuit had "directed that the cause be dismissed [,]" the district court "fully and finally dismissed" the case in an Order dated September 30, 1992. 13sa. The Order was not received by petitioners until after the Petition for a Writ of Certiorari was filed in this Court on October 2, 1992.

challenge to a restrictive abortion law after *Casey* may be precluded from developing a factual record on whether the statute imposes an "undue burden" on a woman's constitutionally protected choice to terminate pregnancy. At the very least, these two courts appear to differ on whether this Court's decision in *Casey* requires denial of a request to reopen a factual record on remand as a matter of law or whether such a request should be decided in the discretion of the district court familiar with the record in the first instance.

A decision on this issue by the court most familiar with the record would permit a careful assessment of the thoroughness of any factual record previously developed and of its applicability to a constitutional determination under the new "undue burden" standard. It would also permit consideration of offers of proof regarding the nature, relevance, and importance of any additional evidentiary proceedings. In sum, remand to the district court would minimize the likelihood that burdens of constitutional magnitude could be imposed on women -- as petitioners assert they have in this case -- prior to consideration of a statute's constitutionality under currently applicable legal standards. *See* Petition for a Writ of Certiorari at 8-9 (citing declarations at 22a-40a).

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Dated: November 22, 1992

SUPPLEMENTAL APPENDIX

Filed October 30, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1662

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA REPRODUCTIVE HEALTH AND COUNSELING CENTER
WOMEN'S HEALTH SERVICES, INC.,
WOMEN'S SUBURBAN CLINIC,
ALLENTOWN WOMEN'S CENTER,
ALLEN, THOMAS, M.D., on behalf of himself and all others similarly situated

v.

CASEY, ROBERT P., RICHARDS, N. MARK, PREATE, ERNEST, personally and in their official capacities, and MARINO, MICHAEL D., personally and in his official capacity, together with all others similarly situated.

Robert P. Casey, N. Mark Richards and Ernest D. Preate, Jr.,

Appellants.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 88-3228)
Remand from the Supreme Court
of the United States
Nos. 91-902 and 91-744

Submitted under Third Circuit Rule 12(6)
September 25, 1992

Before: Stapleton, Alito and Seitz, *Circuit Judges*.

(Filed: October 30, 1992)

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

The Supreme Court of the United States upheld, with

two exceptions, the constitutionality of certain provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. 18 Pa. Cons. Stat. §§ 3203-3220 (1990) (the "Act"). *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). It, in substance, affirmed our earlier judgment in this matter. *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991).

In its implementing mandate the Court first stated that the judgment in No. 91-902 "is affirmed." The petition for certiorari in that case had been filed by defendants-appellants, Casey, et al. (No. 91-902) (the "Commonwealth") attacking the judgment of this court to the extent that it had affirmed the district court's judgment that § 3209 of the Act (spousal notice) was unconstitutional. Since the judgment of our court was affirmed unconditionally on that claim, it is not of further relevance at this point.

In the second part of its mandate the Court stated:

> The judgment in No. 91-744 is affirmed in part and reversed in part, and the case is remanded for proceedings consistent with this opinion, including consideration of the questions of severability.

Thus, the judgment in No. 91-744 affirmed this court's rejection of the constitutional attacks mounted by the plaintiffs ("Clinics") on several portions of the Act. However, the Court reversed our judgment in part. We interpret that portion of the mandate to be based on the fact that we did not go on to declare the related subsection 14(a)(12) of § 3214 (report to Department of Health showing spousal notice) unconstitutional. Pursuant to the Court's mandate, we will therefore amend our judgment to include a provision also invalidating subsection 14(a)(12) of § 3214 of the Act.

We turn now to the portion of the mandate directing us

to consider the question of the severability of the balance of the Act from the two provisions declared unconstitutional.

The first provision declared unconstitutional by the Court is § 3209, entitled "Spousal Notice." It reads in pertinent part as follows:

> (a) Spousal notice required. - In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion
> . . . .

The second, and related, provision declared unconstitutional is subsection 14(a)(12) of § 3214. It required a report of all abortions to the Department of Health containing, *inter alia*, the following information:

> (12) Whether the abortion was performed upon a married woman and, if so, whether notice to her spouse was given. If no notice to her spouse was given, the report shall also indicate the reason for failure to provide notice.

We are met at the threshold with the Commonwealth's contention that the Clinics waived their rights to attack the severability of § 3209 because they did not ask the Supreme Court to review this courts ruling in footnote 27, holding that § 3209 was severable. *Planned Parenthood v. Casey*,

947 F.2d at 715. In the present circumstances we do not decide whether the waiver argument has merit. We so conclude because, very simply, our relative position in the federal judicial hierarchy does not permit us to ignore the Supreme Court's mandate directing us to consider the severability question and we construe that mandate to mean that we should consider that question on its merits. We turn to that task.

The resolution of the severability of the two provisions from the balance of the Act is controlled by state law, in this case, Pennsylvania law. *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 818 (1989). Thus, we must predict whether the Supreme Court of Pennsylvania would sever the unconstitutional provisions and uphold the continuing legal validity of the balance of the Act.

The Abortion Act itself contains the following severability provision:

> The provisions of this act are severable. If any word, phrase or provision of this act or its application to any person or circumstances is held invalid, the invalidity shall not affect any other word, phrase or provision or application of this act which can be given effect without the invalid word, phrase, provisions or application. Act of November 17, 1989, 1989 Pa. Laws 592, No. 64, § 6.

In addition, Pennsylvania has a general severability statute that reads:

> The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or

> circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. 1 Pa. Const. Stat. Ann. § 1925 (Supp. 1991).

It is evident even from a casual reading of each statue that there is a clearly expressed legislative preference to retain the viability of the legal portions of a statute, if reasonably possible. *See Commonwealth, Dep't of Educ. v. First School*, 370 A.2d 702, 705 (Pa. 1977). Against that background, we look to the governing principles set forth in *Saulsbury v. Bethlehem Steel Co.*, 196 A.2d 664, 666 (Pa. 1964):

> [A] statute or ordinance may be partially valid and partially invalid, and . . . if the provisions are distinct and not so interwoven as to be inseparable . . . courts should sustain the valid portions.

To apply the quoted principles, we first ask whether § 3209 and subsection 14(a)(12) of § 3214 are "distinct" from the balance of the Act. Certainly, the invalid provisions of the Act are, as a facial matter, physically distinct from the rest of the Act. Indeed, they did not even appear until the 1989 amendments to the Act. But, even if "distinct" can be said to have a more pervasive application, our view is unaltered. We say this because the subject matter of the invalid sections stands apart in its function from the core provisions of the entire Act. The core provisions are

designed to require that an abortion decision by a woman be based on stipulated information and be made after an assured time to reflect about such a decision. They also impose procedural limitations on the rights of minors to obtain an abortion.

The second question we must answer under Pennsylvania law is whether the invalid provisions are realistically so interwoven with the valid provisions as to be inseparable. The answer to this question obviously may be quite similar to the first. In any event, we think it requires us to juxtapose the valid and invalid provisions and ask whether the valid provisions are functional without the two invalid provisions.

The first invalid provision requires a physician performing an abortion to have, with certain exceptions, a signed statement from the woman involved that she has notified her spouse that she is about to undergo an abortion. The related provision, subsection 14(a)(12) of § 3214, requires that the report to the Department of Health recite that spousal notice was given.

We do not believe that the omission of these requirements would justify, in a meaningful sense, a conclusion that the General Assembly would not have enacted the other provisions of the Act had it known these particular provisions would be invalidated. The basic statutory scheme remains intact and can operate independently of the unconstitutional sections.

The Clinics contend, however, that the invalid provisions are the "centerpiece" of the Act. They argue that the legislative debates demonstrate how deeply many of the legislators favored the inclusion of the spousal notice provisions. The first difficulty with this argument is that such individual comments are not admissible as evidence of legislative intent under Pennsylvania law. *Commonwealth v. Alcoa Properties, Inc.*, 269 A.2d 748 (Pa. 1970); see *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util.*

Comm'n, 837 F.2d 600, 616 (3d Cir. 1980). Furthermore, the intensity of views of individual legislators during the debate with respect to later-declared invalid provisions, standing alone, sheds little light on their intentions in the absence of such provision.

We predict that under the controlling Pennsylvania law the Pennsylvania Supreme Court would hold the invalid provisions severable from the balance of the Act. We adopt the same position.

Finally, as a footnote in their brief on severability, the Clinics assert, as an aside, that they will request the district court to open the record and make further factual findings related to both the "new undue burden analysis" adopted by the Supreme Court, as well as the "preparedness of the Commonwealth to implement the Act." The Commonwealth sought leave to respond. We deny that request because it is not a matter for our court, at least at this time. Our function under the Supreme Court mandate is to decide what we have been directed to decide and to reflect our decision in the modified judgment.

Pursuant to the Supreme Court's mandate, our judgment will be amended to invalidate subsection 14(a)(12) of § 3214 of the Act, and the judgment as amended will constitute the judgment of the court. The matter will be remanded for such further proceedings as may be appropriate.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1953

HELEN B. BARNES, M.D.,
ET AL.,

Plaintiffs-Appellees,

versus

MIKE MOORE, Attorney General
of the State of Mississippi
and his employees, agents
and successors,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Mississippi

Before REYNALDO G. GARZA, DAVIS AND BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion for stay of the mandate pending the filing of a petition for writ of certiorari with the Supreme Court is DENIED.

IT IS FURTHER ORDERED that appellees' motion for injunction pending review of a petition for writ of certiorari by the United States Supreme Court is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HELEN B. BARNES, M.D.; JOSEPH MITCHELL, M.D.; JOSEPH BOOKER, M.D., ON BEHALF OF THEMSELVES, THEIR PATIENTS AND ALL OTHERS SIMILARLY SITUATED; NEW WOMAN MEDICAL CENTER, INC.; MISSISSIPPI WOMEN'S MEDICAL CENTER

PLAINTIFFS

v. CIVIL ACTION NO. J91-0245(W)

MIKE MOORE, AS ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI AND HIS EMPLOYEES, AGENTS AND SUCCESSORS

DEFENDANT

ORDER OF DISMISSAL

The above styled and numbered cause has been remanded to this court by the United States Court of Appeals for the Fifth Circuit wherein the Fifth Circuit vacated this court's preliminary injunction and directed that the cause be dismissed. Therefore, the above styled and numbered cause is hereby fully and finally dismissed.

SO ORDERED this the 30th day of September, 1992.

Henry T. Wingate /S/
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1662

Re: PLANNED PARENTHOOD vs. CASEY

Present: STAPLETON, ALITO and SEITZ, Circuit Judges

1. Appellants' Motion To Permit Surreply Brief on Severability, together with copy of Appellants' Surreply Brief on Severability, (not filed unless the Court directs)

2. Any answer in response to this motion due September 25, 1992 will be forwarded to you upon receipt of same.

Barbara Jacobson /s/
Deputy Clerk - Direct Dial 597-8465

ORDER

The foregoing Motion is/ denied

By the Court,

Seitz /s/
Circuit Judge

Dated: OCT 30 1992